No. D
Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT H. LENHAM,

Petitioner,

v.

DISABLED AMERICAN VETERANS,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Judge Michael E. Vigil of the Court of Appeals of the State of New Mexico refused to recuse himself from a whistleblower lawsuit appeal in which four members involved in the case (in opposition to plaintiff), are Judge Vigil's Judicial Campaign Committee Members, responsible for the solicitation of funds/ support that successfully placed him in the position of presiding over this case. The question presented is whether Judge Michael Vigil's failure to recuse himself from participation in a case involving multiple Members of his Judicial Campaign Committee violated the Due Process Clause of the Fourteenth Amendment.

Judge Carol Vigil of the First District Court of the State of New Mexico failed to recuse herself from a whistleblower lawsuit in which she stated (and was quoted by the Associated Press) that her basis for determining that I was not the truthful party when my testimony contradicted that of an attorney's was because she was an attorney and attorneys have a bond. The question presented is whether Judge Carol Vigil's failure to recuse herself from participation in a case wherein she openly states she is bias "towards attorneys" violated the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

In addition to the party named in the caption, Mr. Charles Joeckel entered the case as the Third Party Defendant/Counter-Claimant. He is now deceased. Oklahoma Attorney Gary Richardson and New Mexico-licensed attorney Tim Butler (for Pro Hac Vice admission by Richardson) joined in as the first Interested Party. Iowa Attorney John Loeschen and New Mexico-licensed attorney J. Ed Hollington (for Pro Hac Vice admission by Loeschen) joined in as the second Interested Party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert H. Lenham, Pro Se, respectfully submits his petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

OPINIONS BELOW

I am not aware of any of the opinions below being published.

JURISDICTION

The Supreme Court of the State of New Mexico entered judgment on January 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This court has emphasized that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). This case affords the Court the opportunity to clarify the circumstances in which a party or the party's lawyer is the judge's Judicial Campaign Committee Member, creating an "appearance of bias" that is so significant that due process requires the recusal of the judge who benefited from the parties' efforts on his/her behalf.

This case involves four members of Judge Michael Vigil's Judicial Campaign Committee making this issue vitally important to preserving the "reputation for impartiality and nonpartisanship" – and, ultimately, the "legitimacy" – "of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). The Defendant DAV retained the law firm of Madison, Harbour, Brennan and Mroz which employs three of Judge Michael Vigil's Judicial Campaign Committee Members. The fourth individual who is Judge Michael Vigil's Judicial Campaign Committee Member is my former attorney, Ed Hollington (who is testifying against me and on behalf of the DAV, claiming that I agreed to settle then reneged which I unequivocably deny).

The underlying case is a whistleblower lawsuit which I filed against my former employer of 23 years, the Disabled American Veterans (DAV) when I was

fired for reporting the misappropriation of hundreds of thousands of dollars donated by the public and numerous other improprieties to the Senate Chairman of the Veterans Affairs Committee, Senator Alan Simpson. During trial preparation, depositions revealed that the Senator's Chief Staff Aide (unbeknownst to Senator Simpson) was the "snitch" who asked my immediate boss, Mr. Butch Joeckel, to meet him for lunch at Duke Ziebert's restaurant in Washington, D.C. to discuss my meeting with the Senator and the Aide's future with the DAV. The record includes DAV accounting records that the Aide became a highly paid consultant for the DAV and received a check for $60,000.00 soon after the Duke Ziebert's meeting.

In July 1996 I hired a local New Mexico attorney Tim Butler, on an hourly basis, to begin the lawsuit. The Associated Press printed the story of the lawsuit, which was read by Oklahoma Attorney Gary Richardson who called me and offered to take the case to trial. He and Butler entered into a contract since Richardson was not licensed in New Mexico.

I hired Richardson on a contingency basis and pre-trial work began. He insisted I hire his friend, Fred Minton, a jury trial consultant. Two weeks or so before the jury selection my attorney, Gary Richardson, called and stated I must settle the case. He threatened to quit, became vulgar and demeaning when I would not agree to settle. I had made it perfectly clear to him that my intent was to go to trial. He quit the case and placed a lien on the settlement I

didn't agree to. I had paid Richardson more than $30,000 towards expenses he refused to explain. He refuses to release my files which include vital evidence including video depositions and a television network interview.

The jury selector, Fred Minton, insisting that my case was excellent and that Richardson has "problems" recommended Iowa Attorney Loeschen take the case to trial. I hired him along with New Mexico attorney Hollington for Loeschen's Pro Hac Vice requisite. Loeschen, the record supports, contacted the DAV attorneys in June of 2000 to ask the DAV if they would put the previous offer (300K) back on the table. I did not hire Loeschen until late Sept. 2000 and did not know he was negotiating the case "behind my back." When I refused to settle, Loeschen joined forces with the DAV and testified against me stating I reneged. The DAV motioned the trial court to enforce settlement and Judge Carol Vigil agreed.

When I appealed to the Court of Appeals of the State of New Mexico, the case was remanded for new findings of fact, and asked the court to investigate several of the attorneys involved for breach of fiduciary duty, misleading the trial court and other admonishments.

The case was reconsidered by Judge Carol Vigil who re-ruled the same (except reversing her decision to enforce Richardson's forum selection clause). She accepted the 72 findings and conclusions submitted mostly by the DAV attorneys with the exception of

approximately 8 by the other attorneys. Judge Carol Vigil resigned (or retired) soon thereafter and my case was assigned to First District Court of New Mexico Judge Daniel Sanchez.

The case was re-appealed by my appellate attorney Joe Kennedy who quit the case when it was assigned to Judge Michael Vigil of the Court of Appeals who wrote the Proposed Summary Disposition. We had had a good report and I couldn't understand why he would quit without reason. I later learned that Joe Kennedy is a Member of Judge Michael Vigil's Judicial Campaign Committee, and it is my belief that he did not want to get involved with the conflict of interest.

While seeking an appellate attorney to continue my second appeal, I learned that my case had been sealed without my knowledge and each attorney I spoke to said if I could get the case unsealed they would review the merits in consideration of representing me. Motion to unseal was denied. Aware of the situation, a reporter from the Albuquerque Journal went to Judge Sanchez and asked about the Constitutionality of denying me access to my case. The reporter called me when he returned from Judge Sanchez's office and said there was a message waiting on his voicemail from Judge Sanchez stating he sealed the file in error and would unseal it immediately. It still took several weeks for me to access my case due to computer problems at the courthouse.

I filed a Memorandum in Opposition and my appeal was assigned to the Expedited Bench (General Calendar). Motion to recuse Judge Michael Vigil was again denied and, after an Oral Hearing before him and 2 other appellate judges, his Proposed Summary Disposition was affirmed. Petition for Writ of Certiorari as well as Motion for Reconsideration was denied by the New Mexico Supreme Court.

This Court's review of Judge Michael Vigil's insistence on participating in this case is warranted to provide authoritative guidance to the lower courts regarding the circumstances in which due process requires recusal of a judge who has benefited from a party or a party's attorney who raised funds on behalf of the judge's election as well as to restore public confidence in the judicial systems of the thirty-nine States that elect their judges. Since Judge Michael Vigil received the case when it was remanded for new findings of fact and conclusions of law as well as fiduciary concerns, a reasonable person would expect to find new findings and conclusions in support of the new ruling by Judge Carol Vigil. This, however, was not the case. The evidence or lack thereof, i.e., attorney fees, attorney expenses, presentment of a settlement agreement that did not exist (therefore could not be "ratified") remained the same and unsupported by the Court of Appeals opinion (written by Judge Michael Vigil) which simply twisted the rationale to conform to the arguments of counsel and Judge Carol Vigil's rulings.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clarify the circumstances in which due process requires the recusal of an elected judge in which his own Judicial Campaign Committee Members are parties or lawyers in a case. This issue was included in the recent case of *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___ (2009) and parallels the same profound ramifications for the Due Process Clause's guarantee of judicial impartiality. In actuality, clarification of this particular issue is necessary as it is the "other side of the coin" of Judicial Campaign bias that has the potential of compromising the public's confidence in this great country's judicial system.

I. JUDGE MICHAEL VIGIL'S REFUSAL TO RECUSE HIMSELF CONFLICTS WITH THE COURT'S DUE PROCESS PRECEDENT.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). Indeed, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a *possibility* of judicial impropriety creates a constitutionally unacceptable risk of *actual* impropriety.

Peters v. Kiff, 407 U.S. 493, 502 (1972). *Caperton v. Massey*, (2009).

Judge Michael Vigil's refusal to recuse himself from this case is in direct opposition to the National Center for State Court's directive which states " . . . *but the judge is disqualified when the judge's Campaign Coordinator or a Campaign Committee Member is a party or lawyer. . . .*" His refusal to recuse himself is in opposition to this Court's requirement that a judge "must avoid even the *appearance* of bias." *Commonwealth Coating Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (emphasis added).

Although in *Caperton v. Massey*, the amount of funds donated were at issue, the amount of money given to Judge Michael Vigil's election campaign due to these committee members' efforts, individually, cannot be easily determined, if at all, further emphasizing the need for review/clarification by this Court.

Judge Vigil's insistence on participating in this case therefore conflicts with this Court's decisions specifying the circumstances in which due process requires recusal. It also deepens a three-way division among the lower courts regarding the due process standard governing recusal determinations and is squarely at odds with a decision of the Supreme Court of Oklahoma holding that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). *Caperton v. Massey* (2009).

This case affords the Court an ideal opportunity both to clarify the circumstances in which due process mandates recusal and to restore the public's waning confidence in state judicial systems in the face of the increasingly significant role of campaign committees in state judicial elections.

"[O]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136. This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted). of the contempt proceedings. *Id.* at 137.

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that a judge who had been subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Despite the absence of evidence of actual bias on the part of the judge, the Court concluded that recusal was required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.* at 465; *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him").

Caperton v. Massey, (2009). Since I had submitted motions requesting Judge Michael Vigil to recuse himself which questioned his impartiality, I would feel confident that Judge Michael Vigil would have a negative "attitude" towards me.

Indeed, just as is human nature for a judge to be biased *against* a criminal defendant whom he has charged with committing contempt or by whom he has been verbally abused, it is equally a part of human nature for a judge to be biased *in favor* of a party whose Campaign Committee members facilitated his election to the bench. *See Republican Party v. While*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) ("relying on campaign donations may leave judges feeling indebted to certain parties or interest groups").

Similarly, just as a judge operates under a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising issues identical to the case pending before him, such a "temptation" is equally acute where the judge is beholden to members of his Campaign Committee for the majority of the funds expended in support of his recent campaign for office – and where casting an outcome-determinative vote against any of his Campaign Committee lawyers may foreclose the possibility of

similar financial support when the judge seeks re-election.[1]

II. JUDGE MICHAEL VIGIL'S REFUSAL TO RECUSE HIMSELF ADDS TO THE SPLIT OF AUTHORITY AN EXISTING CONFLICT AMONG THE LOWER COURTS REGARDING THE CIRCUMSTANCES IN WHICH RECUSAL IS CONSTITUTIONALLY REQUIRED.

Although this Court has repeatedly recognized that "[t]rial before 'an unbiased judge' is essential to due process" (*Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam)), lower courts have reached conflicting conclusions regarding the federal constitutional standard governing recusal determinations – a conflict that extends to the campaign contribution setting implicated in this case. *See also Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) ("Due process requires not only that a judge be fair, but that he also appear to be fair.") (citation omitted); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) ("there need not be an actual claim of bias or impropriety levied, but the mere appearance that

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[1] This Court has held that it "violates the Fourteenth Amendment . . . to subject [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

such an impropriety might exist is enough to implicate due process concerns"); *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (due process requires that justice "'satisfy the appearance of justice'"). *Caperton v. Massey*,' (2009)

The New Mexico Court of Appeals' decision determining the motion for recusal of Judge Michael Vigil to be "moot" was based upon the fact that he was one of a panel of three judges. However, in this Court's review of *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), Justice Brennan stated:

> And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the Court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

It also directly conflicts with a decision in which the Supreme Court of Oklahoma – siding with those courts that have deemed an appearance of impropriety sufficient to require recusal – held that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *See Pierce v. Pierce*, 39

P.3d 791, 799 (Okla. 2001); *see also MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337 n.4 (Fla. 1990) ("There may very well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice.").

In *Pierce*, the Supreme Court of Oklahoma held that it violated federal due process for a judge to preside over divorce proceedings where an attorney for one of the parties had donated $5,000 to the judge's reelection campaign and solicited other contributions on the judge's behalf while the case was pending. 39 P.3d at 799. The court explained that "the reach of due process jurisprudence requires not only a fair tribunal, but also the *appearance* of a fair tribunal." *Id.* at 798 (citing *Murchison*, 349 U.S. at 136) (emphasis in original). Applying the due process principles articulated by this Court in *Murchison*, *Lavoie*, and other cases, the Oklahoma court "conclude[d] that due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge." *Id.* at 799 (emphasis in original).

Because "the appearance of justice is often as important as the proper administration of justice," the Oklahoma court further held that "[c]ampaign contributions and solicitation of contributions of funds for judges by lawyers appearing before those judges in such amounts as to give off an appearance

of partiality is not the type of error to which [it] will apply a harmless error standard." *Pierce*, 39 P.3d at 800. The court therefore disqualified the trial judge from further proceedings in the case. *Id.*

In light of these divergent understandings of federal due process, this Court should grant review to provide the lower courts with authoritative guidance regarding the recusal standard mandated by the Due Process Clause and the circumstances in which that standard requires the recusal of a judge who has benefited from a litigant's campaign expenditures and fundraising efforts. *Caperton v. Massey*, (2009).

III. JUDGE CAROL VIGIL'S STATED (AND QUOTED NATIONALLY BY THE ASSOCIATED PRESS) BIAS "TOWARDS" ATTORNEYS AND "AGAINST" NON-ATTORNEYS WHEN FACED WITH CONTRADICTORY TESTIMONY GREATLY THREATENS PUBLIC CONFIDENCE IN JUDICIAL NEUTRALITY.

In her oral ruling which began appeal process of this case, Judge Carol Vigil of the First District Court of New Mexico indicated bias towards attorneys and against non-attorneys when she made the following statement at the end of the oral hearing:

> **. . . and you know, we attorneys, really don't have a lot of things except our credibility, and if we don't have our credibility, we don't really – we don't**

> **have anything. An attorney's word is his or her bond, comes to mind. . . .**

Judge Carol Vigil's stated bias is, as with Judge Michael Vigil, in violation of this Court's Due Process Precedent. Each argument in support of Judge Michael Vigil's inability to be impartial, (for the sake of time) is applied to Judge Carol Vigil due to the above stated rationale to rule against me.

IV. THE UNDERLYING CASE IS EXCEPTIONALLY IMPORTANT TO THE PUBLIC IN THAT IT IS A WHISTLEBLOWER LAWSUIT THAT PROMISES TO EXPOSE THE MISAPPROPRIATION OF PUBLIC DONATIONS BY A NON-PROFIT CONGRESSIONALLY-CHARTERED VETERANS ORGANIZATION. THIS COURT'S REVIEW WILL PREVENT "JUDICIAL BIAS" FROM DEFEATING A VETERAN'S 13-YEAR BATTLE TO HAVE HIS CASE HEARD BY A JURY IN AN EFFORT TO PUT AN END TO THE CORRUPTION.

I have been asked through the years why I have continued in my efforts to expose the DAV in the courts for thirteen years. The reason is because our military veterans and forefathers have fought and died to provide me this opportunity to be heard by the highest court in the land and I am grateful for this opportunity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROBERT H. LENHAM,

Plaintiff-Appellant,

v. **NO. 27,087**

DISABLED AMERICAN VETERANS,

Defendant-Appellee,

v.

J. EDWARD HOLLINGTON & JOHN L. LOESCHEN,

Interested Parties,

and

TIMOTHY L. BUTLER & GARY L. RICHARDSON, RICHARDSON LAW FIRM, P.C.,

Interested Parties.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Carol J. Vigil and Daniel Sanchez, District Judges

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DECISION

(Filed Sept. 23, 2008)

PICKARD, Judge

Robert Lenham appeals from the district court's findings and conclusions in his wrongful termination suit against Disabled American Veterans (DAV). He appeals the district court's enforcement of his settlement agreement with DAV, the assessment of attorney fees and costs against him and in favor of DAV, the enforcement of a charging lien filed by his former attorneys, and several miscellaneous issues. We affirm.

BACKGROUND

Lenham brought a five-count complaint on July 3, 1996, against DAV following termination of his employment with that organization. The suit was settled below as to its merits. This appeal concerns the circumstances of the settlement and the award of attorney fees and costs among Lenham's attorneys pursuant to the district court's order entered on August 16, 2006.

Over the course of litigation, Lenham was represented by several attorneys, four of whom are parties to this appeal. Timothy Butler and Gary L. Richardson (Butler and Richardson) associated to represent Lenham from the initiation of the suit. In June 2000, the district court granted Butler and Richardson's motion to withdraw, which alleged that Lenham was not amenable to their advice. They had advised Lenham to settle for $300,000. They filed a notice of attorneys' charging lien for $142,000. J. Edward Hollington and John Loeschen (Hollington and Loeschen) then took over the case. In January 2001, Lenham, under disputed circumstances, gave Hollington and Loeschen authority to settle for $300,000. The dispute concerned whether Lenham's offer was supposed to include certain conditions. Hollington and Loeschen communicated the offer to DAV, but by March 2001, Lenham decided that DAV had not met his conditions and that he therefore wanted to go to trial. The district court granted Hollington and Loeschen's motion to withdraw, and they filed a charging lien for 45% of the gross

proceeds of any recovery, plus gross receipts tax. Lenham obtained new counsel.

DAV then filed a motion to enforce the settlement as agreed to by Hollington and Loeschen on Lenham's behalf. DAV's motion also requested costs and attorney fees incurred as a result of Lenham reneging on the settlement agreement. On December 7, 2001, the district court ordered enforcement of the $300,000 settlement and awarded costs and fees in an amount later determined to total $26,700.52. In a final order filed July 2, 2002, the district court allowed Butler and Richardson to keep a payment of $33,884 previously made by Lenham, but otherwise denied their charging lien. The court enforced Hollington and Loeschen's lien in the amount of $142,846.88 and awarded the remaining $130,452.60 to Lenham and his new counsel. Two consolidated appeals followed, in which Lenham appealed the $26,700.52 award to DAV, and Butler and Richardson appealed the dismissal of their charging lien. In a memorandum opinion filed April 5, 2004, this Court found that the district court's order was not sufficiently supported by findings of fact and conclusions of law such that we could conduct meaningful review. We ordered the district court's order vacated and the case remanded with instructions to take further evidence, permit the parties to tender requested findings of fact and conclusions of law, make findings and conclusions sufficient to support appellate review, and enter a new order.

On remand, the parties tendered requested findings of fact and conclusions of law, and two of the attorneys involved in the case filed affidavits in support of their positions. The district court then entered an order again awarding DAV $26,700.52, and awarding Butler and Richardson their lien amount of $142,000, minus the $33,848 already paid to them, for a total of $108,152. The remainder of the $300,000 settlement was to be paid into the court pending the cost and fee application of Hollington and Loeschen, with the earlier order enforcing Hollington and Loeschen's charging lien of $142,846.8 having been vacated by this Court. On October 4, 2005, Hollington and Loeschen filed a motion to alter or amend the judgment and for relief from judgment, and on October 28, 2005, they filed a notice of appeal. This Court dismissed the appeal for a lack of a final order, as the disposition of the remainder of the settlement between Lenham and Hollington and Loeschen had been left open pending the latter's fee application.

Hollington and Loeschen applied for $88,975.74 in fees. The district court entered its final order on August 16, 2006. The court recognized that Lenham had previously been awarded and paid $130,452.60 of the $300,000 settlement. The remaining $169,547.40 was to be divided as follows: $26,700.52 to DAV, $92,850.47 to Butler and Richardson, and $49,996.41 to Hollington and Loeschen. Lenham appeals from this order.

In his brief in chief, Lenham addresses the following issues: (1) whether the court erred in enforcing the settlement agreement, (2) whether the assessment of attorney fees and costs against Lehman [sic] was in error, (3) whether the court's enforcement of charging liens filed by attorneys Butler and Richardson was in error, (4) whether there was collusion involving a jury consultant involved in the case, (5) whether the funds being held by DAV's counsel have been placed in an interest-bearing account, and (6) whether the district court judge was biased. He also addresses the timeliness of his appeal. With regard to this last issue, the district court's final order was filed August 16, 2006. Lenham filed his notice of appeal on September 15, 2006. Lenham's appeal is therefore timely. *See* Rule 12-201(A)(2) NMRA. We address the remainder of Lenham's issues in turn.

DISCUSSION

Standard of Review

An appellate court is deferential to facts found by trial court, but reviews conclusions of law de novo. *See Strata Prod. Co. v. Mercury Exploration Co.*, 121 N.M. 622, 627, 916 P.2d 822, 827 (1996). Where Lenham challenges the findings of fact of the district court, we review these findings for substantial evidence. *Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 25, 136 N.M. 454, 99 P.3d 1166 ("If the district court has applied the correct law, we will

uphold its decision if it is supported by substantial evidence.")

"Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez,* 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). In reviewing for substantial evidence, we "resolve[ ] all disputes of facts in favor of the successful party and indulge[ ] all reasonable inferences in support of the prevailing party." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces,* 1997-NMCA-044, 12, 123 N.M. 329, 940 P.2d 177.

We do not reweigh evidence on appeal. *See id.* We will affirm if there is any reasonable ground that supports the trial court's decision, the question being whether there is evidence to support the result reached, rather than whether the evidence would have supported a different result. *See Gutierrez v. Albertsons, Inc,* 113 N.M. 256, 260, 824 P.2d 1058, 1062 (Ct. App. 1991). "It is a bedrock principle of appellate practice that appellate courts do not decide the facts in a case." *State v. Gonzales,* 1999-NMCA-027, ¶9, 126 N.M. 742, 975 P.2d 355. The trier of fact is in the best position to evaluate the credibility of witnesses, and, on appeal, we do not draw our own conclusions about the credibility of witnesses, *See Tallman v. ABF (Arkansas Best Freight*), 108 N.M. 124, 127, 767 P.2d 363, 366 (Ct. App. 1988). Finally, we note that the fact finder is free to reject either party's version of events. *See State v. Rojo,* 1999-NMSC-001, ¶19, 126 N.M. 438, 971 P.2d 829.

Enforcement of the Settlement Agreement

Lenham contends that the district court erred in its December 1, 2001, ruling enforcing the $300,000 settlement. But Lenham did not appeal this order during the prior appeal. Nor did he raise any issues in the prior appeal contending that the court erred in enforcing the settlement. The prior ruling is now law of the case. *See Varney v. Taylor,* 79 N.M. 652, 654, 448 P.2d 164, 166 (1968) (stating that a decision in a former appeal is binding in later proceedings in the case and that this principle applies not only to questions expressly decided in the prior appeal, but also to questions which might have been but were not raised therein). Although later case law indicates that the law of the ease doctrine is discretionary, courts will choose not to apply the doctrine only in circumstances to correct an obvious injustice. *See State v. Breit,* 1996-NMSC-067, ¶ 12, 122 N.M. 655, 930 P.2d 792.

This is not such a case because there is substantial evidence in the record to support the district court's enforcement of the agreement. The court found that Hollington and Loeschen had been granted actual and apparent authority to enter into the settlement agreement on Lenham's behalf and that Lenham subsequently ratified their action. These findings and conclusions are supported in the record by the sworn affidavits and attachments thereto of Loeschen, DAV attorney Michael J. Dekleva, trial consultant Fred D. Minton, and Lenham's own affidavit. Settlement authority was found by the

court to be unconditional. Moreover, the court found that Lenham understood the case to have been settled for $300,000. These additional findings are also supported by sworn affidavit testimony cited appropriately in the district court's findings. Accordingly, we affirm the district court's enforcement of the settlement agreement between Lenham and DAV.

Attorney Fees and Costs

Lenham contends that the record does not support the district court's award of $26,700.52 in attorney fees and costs to DAV for initiating frivolous and unnecessary litigation. Contrary to Lenham's understanding, the court's findings of fact and conclusions of law make clear that the district court's award was not a discovery sanction made pursuant to Rule 1-037 NMRA, but was instead an attorney fees award made pursuant to our state's bad faith exception to the general rule that attorney fees and costs are not to be recovered by the prevailing party "in the absence of a statute, rule of court, or some agreement expressly authorizing the taxing of attorney [ ] fees in addition to ordinary costs." *Gurule v. Ault*, 103 N.M 17, 19, 702 P.2d 7, 9 (Ct. App. 1985).

> [A] New Mexico court may award attorney fees . . . when a party shows bad faith by disrupting litigation or hampering enforcement of court orders, or when it is necessary to vindicate judicial authority and make the prevailing party whole for expenses caused

> by an opponent's obstinacy under circumstances in which the opponent's behavior is characterized by bad faith or vexatious oppression.

State ex rel. N.M. State Highway and Transp. Dep't v Baca, 116 N.M. 751, 754, 867 P.2d 421, 424 (Ct. App. 1993), *rev'd on other grounds,* 120 N.M. 1, 896 P.2d 1148 (1995) (internal quotation marks and citation omitted). The amount of the award was based on the affidavit and bill of costs of DAV's attorney.

As instructed to do in our prior opinion, the court found, and supported its findings by specific record references, that Lenham had agreed to settle the case and then backed out of the agreement, necessitating additional litigation to enforce the settlement. These findings are supported in the record by Loeschen's sworn affidavits of April 19, 2001, and May 21, 2001, as well as the exhibits attached to the sworn affidavits of DAV's attorney Michael Dekleva, filed July 30, 2001, and August 9, 2001. The record is rife with sworn affidavit testimony that Lenham reneged on the final settlement agreement, ultimately requiring DAV to successfully move the court to enforce the agreement. Accordingly, we cannot say that the court abused its discretion by awarding attorney fees and costs under the bad faith exception. The evidence supports the district court's conclusion of law that "awarding the DAV its costs and fees in the amount of $26,700.52 was reasonable and justified in order for the court to vindicate its judicial authority and compensate [DAV] for the expenses incurred as a

result of frivolous and vexatious litigation," and we affirm the district court on this issue.

We note that the district court also found that Lenham, in responding to a request for production of documents, had withheld two written communications dated February 7 and February 9, 2001, which tended to show he had agreed that the case had been settled at that point in the litigation. The court specifically found that under the circumstances, "Lenham's failure to produce the February 7th and February 9th documents suggests bad faith," but found that the $26,700.52 in attorney fees and costs awarded for the expenses of enforcing the settlement was "sufficient to address the court's concern over the non-production of these documents." The request for production was part of the litigation attempting to enforce the settlement. Because the findings and conclusions make clear that the district court did not award an additional sanction for the discovery violation pursuant to Rule 1-037, this Court's concern in our memorandum opinion of April 5, 2004, that "[t]o the extent that sanctions are imposed under Rule 1-037(D), the district court should make findings determining which fees and costs were 'caused by' Lenham's failure to produce the documents in question and which fees would have been incurred regardless of the alleged abuse" is satisfied. Moreover, Lenham's arguments concerning the circumstances surrounding his withholding of the two documents are invitations to us to reweigh the evidence, which we will not do. The district court made explicit findings,

again supported by record references, outlining why Lenham, even as a lay person, was culpable in not responding to the discovery requests. We affirm the entire award of sanctions.

Butler and Richardson's Charging Lien

In our memorandum opinion filed April 5, 2004, we remanded this case to the district court with instructions to "take further evidence and to permit the parties to tender requested findings of fact and conclusions of law." As far as can be determined from the record, the only further evidence taken consists of an affidavit and billing records submitted by Loeschen and an affidavit submitted by counsel for DAV. We did not order that testimonial evidence be taken in any particular form, and we note that attorney fee matters are frequently decided on affidavits. *See, e.g., Robertson v. Carmel Builders Real Estate,* 2004-NMCA-056, 1149, 135 N.M. 641, 92 P.3d 653; *Miller v. Johnson,* 1998-NMCA-059, ¶¶ 34-35, 125 NM. 175, 958 P.2d 745. Our goal was to obtain findings of fact and conclusions of law sufficient to permit further review. Lenham now argues that the evidence submitted was insufficient to support the court's granting of Butler and Richardson's motion to enforce their charging lien, with credit given for payments already made by Lenham. We hold that the record fully supports the court's conclusion. In findings of fact numbered 1-24, the district court set forth the history of Butler and Richardson's efforts in

the case and their negotiation of a proposed settlement of $300,000, the same amount Lenham ultimately agreed to with subsequent counsel. For example, Butler and Richardson filed over 200 pleadings and responded to ten motions for summary judgment over the three-and-a-half years they represented Lenham. The district court pointed out that Lenham admitted to the existence of the fee agreement, and a copy of the agreement appears in the record. Both Butler and Richardson submitted affidavits and supporting documentation for time and effort spent on behalf of Lenham, including unpaid costs and hourly fees. The court went on to cite *Robison v. Katz,* 104 N.M. 133, 717 P.2d 586 (1986), for the proposition that an attorney may assert a charging lien even though he or she is not the party's current attorney at the time a fund is obtained from the attorney's efforts. Finally, the court cited to the record to establish that Butler and Richardson's withdrawal was reasonable under the circumstances, and it granted Butler and Richardson's motion "[b]ased on equitable considerations."

First, we hold that Butler and Richardson's lien was properly enforced. The factors necessary to find a charging lien enforceable are a valid contract, either express or implied, between attorney and client; a fund recovered by the attorney; clear and unequivocal notice to appropriate parties of the intent to assert the lien; and timely assertion of the lien before distribution of the proceeds recovered for the client. *Sowder v. Sowder,* 1999-NMCA-058 ¶¶ 10-14, 127 N.M. 114, 977 P.2d 1034.

"A charging lien first requires a valid contract, either express or implied, between attorney and client." *Id.* ¶ 10. Here there exists a written agreement as well as a course of conduct between the parties supporting the existence of the contract. Although Lenham asserts that the contract is "subject to Oklahoma courts," he provides no case law or other authority for the proposition that the contract is somehow unenforceable under either Oklahoma or New Mexico law. The contract does not set out by its terms exclusive jurisdiction and venue, and in the course of seven years of litigation in this case, there has been no challenge to the contract even as the parties have subjected themselves continuously to New Mexico jurisdiction and venue through both favorable and adverse rulings.

Although it is clear that Butler and Richardson did not recover a fund on Lenham' s behalf, our courts have previously found that the requirement that the fund be recovered by the efforts of the charging attorney is satisfied when the attorney "contribute[d]" to the ultimate judgment received. *Robison v. Campbell,* 99 N.M. 579. 584, 661 P.2d 479, 484 (Ct. App. 1983). Consistent with the holding of *Robison,* the district court found that Butler and Richardson contributed heavily to the recovery of the $300,000 ultimately awarded to Lenham, a conclusion that we hold is supported by the record.

The record also supports a finding that the third requirement, "that clear and unequivocal notice be given of the intention to assert a lien against any judgment or recovery so that all parties concerned are

aware that no voluntary payment should be made without protecting the attorney's claim of fees and costs," has been met. *See Sowder,* 1999-NMCA-058, ¶ 12 (internal quotation marks and citation omitted). The lien was filed with the district court by Butler and Richardson on June 12, 2000, and was faxed and mailed to all counsel of record and to Lenham on the same day.

Finally, the fourth requirement, that assertion of the lien be timely, has been met. *See Sowder,* 1999-NMCA-058, ¶ 14. A charging lien is waived if the attorney falls to give notice of his intention to assert it before the proceeds of the judgment have been distributed. Id. Here, the charging lien was filed well before the distribution of any proceeds. Accordingly, all four requirements of a valid charging lien have been established by Butler and Richardson and are adequately supported by the record.

Second, we hold further that the fee was reasonable. "Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien." *Northern Pueblos Enters. v. Montgomery,* 98 N.M. 47, 49, 644 P.2d 1036, 1038 (1982). Lenham signed a contingency fee agreement for 50% of the proceeds. Butler and Richardson's fee, had they been Lenham's sole attorneys and obtained the $300,000, should have come as no surprise to Lenham. The district court's rationale in initially allowing Butler and Richardson's lien in full in the order of September 21, 2005, was

apparently that they had done essentially all of the work. This was not entirely correct, as Lenham had not yet agreed to the $300,000 settlement at the time they withdrew, nor had work been done on finalizing the details of the settlement and otherwise bringing the case to an end. Our concerns in this regard are adequately resolved, however, by Butler and Richardson's eventual agreement in the August 16, 2006, final order to settle for a total of $126,698.47, representing the $92,850.47 awarded in the final order plus $33,848 previously paid by Lenham. This amount was substantially less that the lien amount of $142,000. Accordingly, we hold that the attorney fee paid to Butler and Richardson was reasonable under the circumstances, and we affirm the district court's enforcement of the charging lien. Finally, Lenham's argument against Loeschen and Hollington's attorney fee agreement provisions for charging liens is moot, because the district court in fact set aside Loeschen and Hollington's contingency fee agreement. To the extent that Lenham contends that Loeschen and Hollington were awarded fees in quantum meruit for work not done, this issue was not raised in the trial court and cannot be raised for the first time on appeal. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987).

Other Issues

In his brief in chief, Lenham presents three additional issues that were not raised in the district court and find no support in the record. First, he

presents us with a narrative discussion concerning allegations of "collusion" between a jury selector involved in litigation in the district court and his attorneys. His brief does not explain how these allegations were either preserved in the district court or how they otherwise find support in the appellate record. An appellate court's role is limited to the review of those matters decided by the district court. *Moffat v. Branch,* 2005-NMCA-103, ¶ 8, 138 N.M. 224, 118 P.3d 732. "This Court will not consider and counsel should not refer to matters not of record in their briefs." *In re Aaron L.,* 2000-NMCA-024, ¶ 27, 128 N.M. 641, 996 P.2d 431.

Second, Lenham asks whether the funds being held by DAV's counsel have been placed in an interest bearing account. This question presents no issue for decision on appeal. For the sake of clarification, however, DAV states in its brief that DAV's award, along with the award to Butler and Richardson and Hollington and Loeschen are being held in the interest-bearing IOLTA trust account of DAV's counsel until final resolution of this matter.

Third, Lenham alleges "bias" on the part of the district court judge, apparently because when the judge addressed the parties from the bench on the topic of professionalism, she repeatedly used phrases such as "we as attorneys," and "we attorneys." Lenham seems to suggest that because the judge included herself in the class of persons subject to professional standards, she was biased against him and partial to the arguments of Lenham's former

attorneys. We fail to see how these statements by the judge demonstrate any bias or impartiality on her part.

CONCLUSION

We affirm. The parties shall bear their own fees and costs on appeal.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD, Judge

WE CONCUR:

/s/ Jonathan B. Sutin
JONATHAN B. SUTIN
Chief Judge

/s/ Michael E. Vigil
MICHAEL E. VIGIL,
Judge

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM,

Plaintiff-Appellant,

vs.

Nos. 23,410 & 23,506

DISABLED AMERICAN VETERANS,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
Carol J. Vigil, District Judge

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MEMORANDUM OPINION

(Filed Apr. 5, 2004)

ALARID, Judge.

Plaintiff, Robert Lenham, appeals a decision awarding Defendant, Disabled American Veterans, $26,700.52 in costs and attorney's fees as sanctions for bad faith litigation or in the alternative, as sanctions for discovery abuses. Lenham also appeals from a decision enforcing an attorney's charging lien in favor of his second set of attorneys, J. Edward Hollington and John Loeschen. Timothy L. Butler and Gary L. Richardson, Lenham's original attorneys, appeal from an order dismissing their attorney's charging lien. In each instance, we reverse and remand for the entry of findings of fact and conclusions of law sufficient to support meaningful appellate review.

BACKGROUND

In July 1996 Lenham sued his former employer, Defendant Disabled American Veterans (the DAV). Timothy L. Butler, a New Mexico attorney, prepared and filed the complaint. Lenham discharged Butler and hired the firm of Oklahoma lawyer Gary L. Richardson. Lenham and Richardson entered into a written contingency fee agreement, which also

provided for hourly billing at reduced rates. With Lenham's knowledge, Richardson re-retained Butler as New Mexico co-counsel. There is no written fee agreement between Lenham and Butler. Butler and Richardson vigorously litigated the case.

As the July 2000 trial date approached, the DAV expressed interest in a settlement. Concerned by problems with Lenham's case, Butler and Richardson pressed Lenham for authority to make a settlement offer at $275,000-$300,000, which they believed was reasonable. Lenham refused, eventually advising Richardson that Lenham and his wife "fe[lt] the Lord is directing us to take this issue to trial." When further attempts to extract settlement authority were unsuccessful, Butler and Richardson moved to withdraw. Butler and Richardson filed an attorney's charging lien charging client $142,000. The district court granted Butler and Richardson's motion to withdraw and vacated the pending July 2000 trial date in a June 14, 2000 order.

Shortly after Butler and Richardson's withdrawal, Leham [sic] retained as his attorneys, Appellees, J. Edward Hollington of Albuquerque and John L. Loeschen of Burlington, Iowa. In September 2000 Hollington and Loeschen entered into a written contingency fee agreement with Lenham. The Hollington-Loeschen fee agreement expressly recognized Hollington and Loeschen's right to assert a charging lien upon any recovery, whether by settlement or judgment.

There is no dispute Loeschen met with Lenham and his wife on January 6-7, 2001, and that during the January 6-7 meeting Lenham authorized Loeschen and Hollington to offer to settle the case for $300,000. On January 8, 2001, Loeschen and Hollington met with counsel for the DAV and offered to settle the case for $300,000.

On January 26, 2001, Loeschen spoke with counsel for the DAV, who informed Loeschen that the DAV had accepted the January 8 offer to settle the case for $300,000. Both Loeschen and Hollington spoke with Lenham on January 26. Around this time relations between Lenham and his counsel and Lenham and the DAV begin to sour. Lenham was not present at the January 8, 2001 settlement conference; accordingly, he had no personal knowledge of the settlement terms Loeschen and Hollington communicated to the DAV. The principal dispute between Lenham and Loeschen and Hollington, and eventually between Lenham and the DAV, was whether Lenham had instructed Loeschen and Hollington during the January 6-7 meeting to attach certain conditions to Lenham's agreement to settle.

In a January 30, 2001 letter, Loeschen urged Lenham to accept the settlement, warning Lenham that counsel for the DAV was prepared to bring suit against Lenham to enforce the settlement. Lenham refused to execute the settlement documents, maintaining that although the DAV had agreed to pay $300,000, he had not authorized a settlement unless DAV also agreed to his conditions. On March

4, 2001, Lenham wrote Loeschen stating that "We can argue this point until we 'are blue in the face', but I'll say it again . . . the conditions I originally authorized you to present to the DAV were not met. I therefore, once again, request my right to go to trial with you as my attorney."

Lenham's refusal to accept the settlement negotiated by Loeschen and Hollington led to a breakdown of relations between Lenham and counsel. On April 9, 2001, Loeschen filed a motion to withdraw as counsel, citing Lenham's "insistence upon pursuing an objective that counsel of record considers imprudent." Loeschen asserted that "at this point [I am] unable to zealously, effectively, and in good faith continue to represent the interest and objectives of the Plaintiff at the trial of this matter." On May 16, 2001, Hollington filed a motion to withdraw as counsel citing the same grounds. Loeschen and Hollington filed a notice of charging lien.

Lenham retained a third set of attorneys, New Mexico attorney D. Todd Lazar and Honolulu, Hawaii attorney William E. H. Tagupa.

In the meantime, the DAV had filed a motion to enforce the settlement. The DAV argued that Loeschen and Hollington had had express authority from Lenham to settle the case for $300,000. The DAV requested an award of attorney's fees and costs as sanctions for Lenham's bad faith in repudiating the settlement.

Lenham, now represented by Tagupa and Lazar, filed a response arguing that Lenham and the DAV had not reached a meeting of the minds. Citing *Augustus v. John Williams & Assoc., Inc.*, 92 N.M. 437, 589 P.2d 1028 (1979), Lenham's response argued that Loeschen and Hollington had lacked actual authority to make a settlement offer that omitted conditions imposed by Lenham. Lenham's response quoted the following excerpt from Lenham's January 29, 2001 letter to Loeschen:

> During your visit with us [Lenham and his wife] on January 6th and 7th, we discussed various options and agreed to settle with the DAV based strictly on the following conditions. If these conditions were not met then we were ready to go to trial. (This could be done according to your calculations made that evening if the DAV were to make the $300,000 punitive damages):
>
> 1. Making a $300,000 settlement offer if it would net me $195,000 (Please note that when I refer to the net amount of $195,000, I am referring to the actual cash amount "in my pocket", so to speak, after all debts, liens, fees etc. have been satisfied.
>
> 2. The DAV's response must be made in 7 days[.]
>
> 3. The check would be mailed to you and placed in your trust account so you could handle the disbursement including preventing Richardson and Butler form [sic]

> "tying up" the money by taking advantage of the judicial system of New Mexico.

Quoting from *Augustus*, Lenham argued that "'[a]n unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client.'"

The DAV filed a reply in which it argued that Lenham had not communicated any alleged conditions to his counsel prior to January 8, 2001, when Loeschen and Hollington communicated to counsel for the DAV an unconditional offer to settle for $300,000. For the first time, the DAV argued that Loeschen and Hollington had had apparent authority or alternatively, that even if they had lacked apparent authority on January 8, 2001, Lenham subsequently had ratified the settlement. The DAV attached the affidavit of Fred D. Minton, who had been present during the January 6-7, 2001 meeting between Lenham and Loeschen. Minton's affidavit refuted Lenham's claim that he had attached conditions to the settlement offer. The DAV also attached an affidavit executed by Loeschen on May 21, 2001. Loeschen expressly denied Lenham's claims that Lenham had imposed, as conditions of settlement, an express deadline for acceptance and a net recovery of $195,000.

The district court conducted a hearing on the DAV's motion on August 24, 2001. A considerable

portion of the transcript consists of the unsworn arguments and statements of counsel and references to exhibits filed in the record. Lenham, Loeschen and Hollington were present and gave testimony under oath.

Lenham testified that Loeschen had advised him during discussions on January 7, 2001, that punitive damages would not be taxable and had calculated the net recovery on a $300,000 settlement characterized as punitive damages. Lenham testified to his understanding that the significance of punitive damages was "[t]hat there [would] be no taxes on anything that was given under punitive damages." Hollington and Loeschen both testified to their belief that they had made a valid settlement offer at the January 8, 2001 meeting with counsel for the DAV.

At the end of the hearing the district court made an oral ruling, granting the DAV's motion:

> When I was listening to today's case, one of the things that struck me, and it was because of Mr. Tagupa's use of legal maxims when something came to mind that our Supreme Court has been very, very interested in, and it comes by way of making sure that when we as attorneys are practicing, that we deal with each other in a very professional manner. It's called professionalism. And, you know, we attorneys, really don't have a lot of things except our credibility, and if we don't have our credibility, we don't really – we don't have

> anything. An attorney's word is his or her bond, comes to mind. And with that I am going to grant the Motion to Enforce the Settlement. I believe the second draft was the settlement that was approved by the attorneys. I'm going to find that Mr. Loeschen and Mr. Hollington had actual authority from the [Plaintiff] to enter into this agreement.
>
> The evidence does not support the Defendant's claims especially concerning time limits and other additional issues that were brought up later on.
>
> I'm real concerned also because of the amount of time that it took to get the discovery. . . .
>
> . . .
>
> I'm going to also find that there were some discovery abuses in the production of the documents that supported ratification of this agreement, and as a result I'm going to grant attorneys' fees and costs concerning this motion to enforce.

On December 7, 2001, the district court entered an order granting the DAV's motion to enforce, and the DAV's motion for sanctions. The December 7, 2001 order did not fix the amount of costs and fees to be awarded to the DAV.

On February 18, 2002, the district court held a hearing on various matters, including the amount of costs and fees to be awarded to the DAV and the

validity of the attorney's charging liens filed by Butler and Richardson and Loeschen and Hollington.

Butler appeared on behalf of himself and Richardson. Butler argued that the lien should be enforced to the full extent that fees were allowable under the Lenham-Richardson contingency fee agreement. In the alternative, Butler argued that the lien should be enforced to the extent that Butler and Richardson were entitled to recovery in *quantum meruit*. Butler conceded that an attorney who voluntarily withdraws is precluded from recovering fees; however, Butler argued that Lenham's rejection of their advice to settle provided "justifiable cause for withdrawing."

Hollington and Loeschen were both present. Hollington, speaking for both himself and Loeschen, referred the district court to the fee agreement between Lenham and Loeschen-Hollington. Hollington argued that Loeschen had had to review over twenty boxes of documents and had performed "a lot of work in reviewing, analyzing this case, not only getting . . . ready for trial, but, of course, getting it ready for an attempt to try to evaluate a settlement," and that the $300,000 settlement with the DAV was reached through his and Loeschen's efforts. Hollington argued that he and Loeschen had been "forced" to withdraw when Lenham denied that they had had authority to settle the case.

In response to Butler and Richardson, Lazar, representing Lenham, argued that (1) the evidence

did not establish $300,000 as the settlement value of the case at the time Butler and Richardson withdrew, (2) Lenham's decision to take the case to trial did not constitute cause for withdrawing, and (3) the Lenham-Richardson fee agreement did not authorize a charging lien. In response to Hollington and Loeschen, Lazar argued that (1) Loeschen had contacted counsel for the DAV and confirmed the DAV's willingness to settle for $300,000 before he and Hollington even entered an appearance, and (2) Loeschen and Hollington had negotiated a settlement that "completely ignored" conditions imposed by Lenham.

Following Lenham's response, both counsel for the DAV and Loeschen took issue with Lazar's statement that Loeschen and the DAV had agreed to a settlement before Loeschen entered an appearance. In rebuttal, Lazar pointed out that in its memorandum in support of its motion to enforce, the DAV had made that very representation.

The district court entered a decision on April 30, 2002, awarding the DAV costs of $657.02 and attorney's fees of $26,043.50; allowing Butler and Richardson to retain $33,884.00 previously paid by Lenham, but denying Butler and Richardson further compensation and "dismissing" their charging lien; and enforcing Loeschen and Hollington's lien as to $142,846.88 out of the $300,000 settlement amount.

DISCUSSION

We begin with an admonishment to counsel. Contrary to the assertions of counsel for the DAV in both this Court and the district court, the record does not support the DAV's effort to portray Lenham as a serial reneger. Our review of the record satisfies us that there is absolutely no evidence that Lenham ever authorized Butler and Richardson to settle his case for $300,000. Contemporaneous correspondence between Lenham, Butler and Richardson reflects growing frustration on the part of Butler and Richardson precisely because Lenham refused to give Butler and Richardson authority to settle for $300,000. This correspondence between Lenham, Butler and Richardson was attached to the papers offered in support of the DAV's motion to enforce, and we must presume that counsel for the DAV was aware of the content of this correspondence when they repeatedly represented to the district court at the August 24, 2001 hearing that Lenham had backed-out of an earlier settlement negotiated by Richardson, and when they represented to this Court that this case has settled twice. Even if we consider the unsworn representations of the DAV's counsel during the August 24, 2001 hearing, the best case that can be made out is that Richardson, without having obtained actual authority from Lenham, represented to the DAV's counsel that he could obtain authority to settle for $300,000 if the DAV would confirm $300,000 was available. This testimony does not demonstrate reneging on Lenham's part; rather, it

demonstrates the peril of counsel's negotiating ahead of his actual authority.

We leave it to the district court to determine whether counsel for the DAV acted in good faith in representing to the district court that Lenham had twice reneged on a settlement. The fact that this representation actually distorted the district court's understanding of the facts and may have influenced the district court's decision on the merits is reflected by the district court's recital in its April 20, 2002 decision that "[t]his matter has been through two major settlements." Because we are reversing and remanding on other grounds, we encourage the district court to revisit the issues of the appropriateness and amount of sanctions in light of the observations set out above.

1. Sanctions for Bad Faith

In *State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 120 N.M. 1, 896 P.2d 1148 (1995), our Supreme Court recognized a bad-faith litigation exception to the American Rule governing attorney's fees. Imposition of sanctions under *Baca* are reviewed for an abuse of discretion. *Id.* at 8, 896 P.2d at 1155.

The district court concluded that the parties had reached a binding settlement agreement on alternative theories of actual and apparent authority. We consider each of these theories in turn.

"To establish apparent authority, the relying party must base the relationship upon words or acts of the principal, and not the representations or acts of the agent." *Tercero v. Roman Catholic Diocese of Norwich*, 2002-NMSC-018, ¶ 12, 132 N.M. 312, 48 P.3d 50 (internal quotation marks omitted). It is well settled that a client's employment of an attorney does not of itself give rise to apparent authority to settle the client's case. *Augustus*, 92 N.M. at 439, 589 P.2d at 1030. There is no evidence of any conduct *by Lenham*, (who was not present during the settlement conference) other than his employment of Loeschen and Hollington, that would have led counsel for the DAV to assume that Loeschen and Hollington had *unconditional* authority to settle the case. To the extent the DAV's motion to enforce was based on a claim of apparent authority, opposition was neither frivolous nor in bad faith.

In view of our conclusion that Lenham did not act in bad faith in opposing the DAV's claim of apparent authority, the propriety of sanctions for bad faith ultimately depends on whether Lenham lacked a good faith basis either in fact or in law for opposing the DAV's claim that Loeschen and Hollington had actual authority to make an offer that did not include the conditions referred to in Lenham's letter of January 29, 2001. As we understand *Baca's* exception to the American Rule, sanctions are not justified merely because a party's position appears erroneous in hindsight. *Baca's* exception must not be applied so freely as to swallow the American Rule by routinely

allowing attorney's fees to a prevailing party. Bad faith refers to a litigant's or attorney's subjective state of mind, requiring an inquiry into what the party to be sanctioned actually knew or believed about the factual and legal merits of his position. *Cf. Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 674, 808 P.2d 955, 959 (1991) (discussing bad faith in the context of Rule 1-011NMRA 2004). Where bad faith sanctions are sought directly against a non-lawyer, a court must be sensitive to the possibility that a layperson entertained a mistaken, but nevertheless good faith, view of the law. *See id.* at 675, 808 P.2d at 960 (distinguishing between grounds for awarding sanctions against client and grounds for awarding sanction against attorney).

Like *Baca,* this is a case where the district court's findings and conclusions are inadequate to support sanctions. There are no findings or conclusions addressing Lenham's actual understanding of the factual and legal merits of his position on actual authority. However, we cannot say as a matter of law that the record lacks substantial evidence supporting the district court's decision. We therefore reverse and remand to give the parties the opportunity to submit proposed findings of fact and conclusions of law and to give the district court an opportunity to enter more detailed findings and conclusions. To assist this Court, should this case again come before this Court, we direct that each proposed finding of fact submitted by a party shall contain a cite to the specific portion of the record supporting that finding. We remind

counsel for the parties and the district court that the argument of counsel is not evidence. *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 51, 128 N.M. 434, 993 P.2d 751.

2. Discovery Sanctions

As an alternative ground for recovering attorney's fees, the DAV argued that sanctions were justified by alleged discovery abuse on the part of Lenham. A few additional facts are required in order to understand this issue. On or about May 7, 2001, in connection with its motion to enforce, the DAV mailed to Lenham's counsel the following request for production of documents:

> ***REQUEST NO. 1***: Please produce all copies of correspondence, memoranda, and any other documents generated by Mr. Lenham, Mrs. Lenham, any other third persons, or his current or former attorneys regarding the subject of settlement generally, or regarding any and all settlement negotiations during the pendency of this lawsuit.

In response to the DAV's request for production, Lenham executed an "affidavit" authenticating fourteen attached letters as "true and correct copies or portions of copies sent or received by me concerning the proposed settlement agreement with the Disabled American Veterans and/or pertaining to the Liens placed on this case." This affidavit was received by counsel for the DAV on June 5, 2001.

Previously, in his May 21, 2001 affidavit, Loeschen had referred to correspondence he received from Lenham on February 7 and 9, 2001. For reasons that do not appear of record, Lenham did not attach the February 7 and 9, 2001 correspondence to his affidavit, even though the remaining correspondence between Lenham and Loeschen was produced. When the February 7 and 9, 2001 documents were not produced with the other correspondence attached to Lenham's June 2, 2001 affidavit, counsel for the DAV showed the fourteen produced documents to Loeschen, who confirmed that there were additional documents that Lenham had not produced. The DAV filed a July 6, 2001 motion seeking an expedited determination of whether Lenham had waived the attorney-client privilege. Referring to Loeschen's affidavit, the DAV's motion asserted that "[o]n information and belief, Loeschen is in possession of additional correspondence from Lenham that is potentially dispositive with regard to the DAV's Motion to Enforce Settlement Agreement," but that Loeschen had declined to produce it without an order either (1) determining that the attorney-client privilege had been waived as to settlement negotiations, or (2) compelling production of the documents. On July 17, 2001, Lenham, by now represented by Tagupa and Lazar, filed a memorandum both objecting to the DAV's motion and requesting a protective order. Lenham proposed as a compromise to the discovery dispute that any documents in Loeschen's possession should be submitted to the district court for *in camera* inspection.

The district court appears to have granted the DAV's discovery motion during a July 31, 2001 telephonic hearing. On August 21, 2001, the district court entered a written order directing Loeschen to produce correspondence between Loeschen and Lenham concerning settlement.

The text of the disputed correspondence, which consists of two fax cover sheets with handwritten notes, is set out below:

> [February 7, 2001]
>
> Re: Settlement
>
> John – Following are the IRS requirements for taxable and non-taxable damages on the lawsuit. If you should have any questions, feel free to contact [my accountant]. Hopefully you able to do some "creative figuring" on our award.
>
> [February 9, 2001]
>
> John – Hope you have had a *GREAT* weekend. If the DAV starts placing demands on this settlement I am suggesting we advise them that we will go to trial.

On August 9, 2001, the DAV brought a motion for sanctions pursuant to Rule 1-037(D) NMRA 2004 or, in the alternative, the district court's inherent power to enforce discovery rules. The DAV asserted that in response to a request for all correspondence between Lenham and his attorneys relating to the settlement of the lawsuit Lenham had "withheld" the February 7

and 9, 2001 faxes. The DAV asserted that Lenham was guilty of a "willful, bad faith failure to produce critical documents in response to the DAV's request for production." The district court granted the DAV's motion, finding that "[t]he DAV incurred substantial legal fees and costs as a result of Lenham wrongfully reneging on the settlement agreement, and *his subsequent abuse of the discovery process, where he withheld documents probative of the issue of ratification of the settlement agreement.*" (Emphasis added).[1]

We cannot determine the district court's reasoning from the district court's written rulings on sanctions. To the extent the district court relied on *Baca* as applied to the context of bad faith in discovery, *see Marchman v. NCNB Texas Nat'l Bank*, 120 N.M. 74, 90, 898 P.2d 709, 725 (1995) (citing *Baca* as authority for discovery sanctions), we must reverse and remand for entry of findings of fact and conclusions of law justifying an award of sanctions for bad faith. The district court should bear in mind our observations set out above regarding the subjective nature of bad faith and its application to non-lawyers. To the extent that the sanctions are awarded for mere non-disclosure under Rule 1-037(D), *see Enriquez v.*

---

[1] Although the order justified the award of sanctions on the ground that Lenham "withheld [critical] documents probative of the issue of ratification," the district court in fact did not rest its decision enforcing the settlement on ratification: there are no findings expressly addressing ratification.

Cochran, 1998-NMCA-157, ¶ 45, 126 N.M. 196, 967 P.2d 1136 (observing that wrongful intent is not required for the imposition of discovery sanctions), the district court should enter findings and conclusions demonstrating that it properly "balance[d] the nature of the offense, the potential prejudice to the parties, the effectiveness of the sanction, and the imperative that the integrity of the court's orders and the judicial process must be protected," *id.* ¶ 48.

Lastly, we note that Rule 1-037(D) authorizes a district court to award a party reasonable expenses, including attorney's fees, "caused by" another party's failure to respond to a request for production. However, the entire $26,700.52 in fees and costs incurred by the DAV in enforcing the settlement cannot as a matter of logic have been "caused by" Lenham's alleged abuse of discovery. Most obviously, attorney's fees incurred in preparing the DAV's motion to enforce, which was filed on April 19, 2001, prior to service of the DAV's request for production, cannot have been "caused by" a default in responding to a subsequent discovery request. To the extent that sanctions are imposed under Rule 1-037(D), the district court should make findings determining which fees and costs were "caused by" Lenham's failure to produce the documents in question and which fees and costs would have been incurred regardless of the alleged abuse.

3. Attorney's Charging Liens

A district court's decision to enforce or extinguish an attorney's charging lien involves an exercise of the court's equitable powers. *Northern Pueblo Enters. v. Montgomery*, 98 N.M. 47, 49, 644 P.2d 1036, 1038 (1982). We review a district court's decision in a proceeding on a charging lien for an abuse of discretion. *Philipbar v. Philipbar*, 1999-NMCA-063, ¶ 9, 127 N.M. 341, 980 P.2d 1075.

The district court's rulings on the attorney's liens present the same problems that we have noted above with respect to the DAV's motion to enforce and the rulings on sanctions: although there appears to be substantial evidence that might support the district court's rulings under unarticulated rationales, we cannot determine the actual factual and legal basis for the court's rulings from its order. We realize of course that Rule 1-052(A) NMRA 2004 generally does not require a district court to make findings of fact and conclusions of law in determining motions. Whether a proceeding on an attorney's lien is a "motion" or a "case tried by the court without a jury" for purposes of Rule 1-052 is a question we leave for another case. A remand for entry of findings of fact and conclusions of law may be justified even though Rule 1-052 is not strictly applicable. *E.g., Baca*, 120 N.M. at 9, 896 P.2d at 1156 (remanding for additional findings of fact on issue of sanctions); *Rest, Mgmt. Co. v. Kiddo-Fenwal, Inc.*, 1999-NMCA-101, ¶ 23, 127 N.M. 708, 986 P.2d 504 (same).

As we have noted above, the arguments of counsel are not evidence. Nonetheless, the arguments of counsel have presented us with what appears to be a troubling conflict in the representations made to the district court. In the DAV's memorandum in support of its motion to enforce, counsel for the DAV represented to the district court that

> On June, 30, 2000, after Richardson and Butler withdrew from representing Lenham, John Loeschen, an attorney practicing in Burlington, Iowa, contacted the attorneys for the DAV. Loeschen advised the DAV's counsel that he would be representing Lenham with New Mexico attorney J. Edward Hollington, and that his client wanted to settle the case for the summer 2000 settlement amount. According to Loeschen, Lenham would have accepted the summer 2000 settlement amount, but contended that he [Lenham] had not been advised by Richardson and Butler that the sum had been offered. In response to Loeschen's inquiry, the DAV's attorney advised Loeschen that he would need to inquire into whether that sum was still available.

At the February 18, 2002 hearing, Lazar argued that the award of fees based on the Loeschen-Hollington contingency fee agreement was unreasonable because Loeschen knew what the case would settle for before he even entered into the September 2000 contingency fee agreement with Lenham.

Loeschen responded with indignation to Lazar's argument:

> I have no idea what Mr. Lazar is referring to or alluding to, and I do consider those statements to be an attack on my professional integrity and also upon my credibility. I have my hourly time spent on this case, and *in no way, shape or form did I ever know that there was ever an amount offered in settlement in this case until I had discussions with [counsel for the DAV] and we had talked about the possibility of settling this case.* (Emphasis added).

In rebuttal, Lazar cited tc the portion of the DAV's memorandum set out above. In their brief in this Court, Loeschen and Hollington do not refer to a June 30, 2000 conversation concerning settlement between Loeschen and counsel for the DAV. Loeschen and Hollington represent that settlement negotiations were initiated "in late 2000 with DAV attorneys."

As our previous remarks concerning counsel for the DAV's misstatement of the record demonstrate, we take very seriously the duty of candor imposed by the Rules of Professional Responsibility. Moreover, apart from ethical concerns, the DAV's statements, if true, suggest a possible material breach of fiduciary duty on the part of Loeschen; entering into the September 2000 contingency fee agreement with Lenham without disclosing to Lenham the possibility that the case could be settled with minimal litigation and little risk of non-recovery, and hence the

possibility that an hourly fee arrangement would have been in Lenham's best interests. *See* Restatement (Third) of the Law Governing Lawyers § 18 cmt. e (2000) (discussing heightened scrutiny of lawyer-client contracts entered into during a representation); *see also id.* § 35 cmts. c, d (2000) (observing that a contingency fee may be unreasonable where at the inception of the fee agreement there is little risk of non-recovery).

On remand, the district court should enter findings resolving the factual issues of when Loeschen first contacted counsel for the DAV to discuss settlement and when Loeschen first came to believe that the case could be settled for $300,000. The district court should determine whether actual misstatements of fact concerning the substance of the June 30, 2000 conversation were made to the district court, and if so, how and why they came to be made. Counsel for the DAV and Loeschen should be permitted to submit additional evidence and argument defending, clarifying or explaining their representations.

CONCLUSION

Because the district court's decision is not supported by findings of fact and conclusions of law that enable us to conduct meaningful review, we vacate the orders denying enforcement of the Bulter [sic]-Richardson lien, enforcing the Hollington-Loeschen lien and awarding sanctions against Lenham. We

remand with instructions to the district court to take further evidence and to permit the parties to tender requested findings of fact and conclusions of law. The district court is further instructed to make findings of fact and conclusions of law sufficient to support appellate review and to enter new orders on those findings of fact and conclusions of law. The parties shall bear their own costs and attorney's fees incurred on appeal.

IT IS SO ORDERED.

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

I CONCUR:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

/s/ Lynn Pickard
LYNN PICKARD, Judge
(concurring in result only)

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM

Plaintiff-Appellant

Vs.

DISABLED AMERICAN VETERANS

Defendant-Appellee

Court of Appeals
No. 27,087
Santa Fe County
D0101-CV-96-01601

MOTION TO DISQUALIFY JUDGE MICHAEL E. VIGIL FROM PRESIDING OVER THIS CASE AND MOTION TO VACATE JUDGE MICHAEL VIGIL'S PROPOSED SUMMARY DISPOSITION OF THIS CASE.

(Filed Oct. 8, 2008)

Plaintiff-Appellant Robert H. Lenham respectfully requests the recusal of Court of Appeals Judge Michael E. Vigil from this case and requests that his Proposed Summary Disposition be vacated pursuant to (but not limited to) New Mexico Rules, New Mexico Laws, New Mexico Constitution, New Mexico Judicial Code of Conduct, National Center for State Courts, American Bar Association Model Code of Judicial Conduct, and numerous New Mexico Judicial Advisory Committee on the Code of Judicial Conduct decisions for his impartiality and/or appearance of impartiality due to the fact that five of the attorneys involved in this case were Judge Michael E. Vigil's Judicial Campaign Committee Members for his re-election to the position he holds today. They are:

DeKleva	Law firm of Madison, Harbour, Mroz & Brennan, P.A.
Brennan	Law firm of Madison, Harbour, Mroz & Brennan, P.A.
Harbour	Law firm of Madison, Harbour, Mroz & Brennan, P.A.
Ed Hollington	(pro hac vice John Loeschen)
*Joe Kennedy	

Please note that attorney Bill Madison has been the lead attorney for the Defendant Disabled American Veterans, and it is his law firm that employs three of Judge Michael E. Vigil's judicial campaign committee members.

[After consultation with the original panel, the motion is denied. Lynn Pickard Presiding Judge 10-10-08 /s/ LP]

*Note – Joe Kennedy filed a motion to withdraw as my lawyer on Feb. 21, 2007 and was approved to do so the very next day. The court's action to expeditiously accept his withdrawal, denied me the opportunity to contest the action, ultimately compromising my ability to have a New Mexico licensed attorney represent me at such a late hour. I was informed by the first attorney contacted, that when she tried to access the case for consideration, she learned that the case was sealed. Every attorney I spoke to (over 12) said they could not possibly respond to Michael E. Vigil's Proposed Summary Disposition without access to the case. In light of the dilemma (and Joe Kennedy's refusal to return any of my calls), I filed a motion for an extension of time

(which was graciously granted) and a motion to unseal the file, which was denied. The case was finally 'unsealed' (many weeks later) when newspaper reporter, Tom Cole, from the Albuquerque Journal (he was concerned about the 'justice/fairness' of the situation) went to see the judge who sealed the case (Judge Daniel Sanchez). The judge informed the reporter that the case was 'sealed in error' and that it would be unsealed immediately. I spent the next several weeks trying to access the case and was told by Janet at the court that "Adrian' was trying to 'fix' the problem. I ran out of time to hire an attorney (the last attorney said he would not have time (I was down to 3 days before the deadline to respond to this Proposed Summary Disposition) even if he were paid an exorbitant amount of money to do so. As a result, I find myself representing myself pro se, out of necessity.

The applicable references to support this matter are as follows:

Code of Judicial Conduct, Section 3E(1) **"A judge shall disqualify himself or herself (when) the judge's impartiality might reasonably be questioned."**

Rule 21-400(A), NMRA 1997 **"A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality can reasonably be questioned . . . "**

Rule 21-200, NMRA 1997, **requires a judge to avoid impropriety and the appearance of impropriety**.

Supreme Court Rules of the Code of Judicial Conduct, Rules 63C(1) **" . . . requires disqualification if a judge's impartiality might reasonably be questioned . . .**

South Carolina Sup. Ct., Op. 5-1982 (1982)

SCRA 1986, 21-400(A) (Advance Annotation & Rules Serv. Apr. 1995), which became effective Feb.16, 1995 is applicable and state in pertinent part:

Recusal. A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

National Center for State Courts (NCSC) specifically addresses this matter in "Judicial Ethics, Conduct, and Discipline", under subsection entitled **"When is recusal or disqualification appropriate and what are the procedures for them?":**

"A judge is not disqualified when an ordinary judicial election campaign contributor is a party or lawyer in the matter. The contributions are relevant to the disqualification analysis but are not per se disqualifying. But the judge is disqualified when the judge's campaign coordinator or a campaign committee member is a party or lawyer in a matter"

As we all know, the public places its trust in the judges of this great country. Because judges are the direct reflection of this country's judicial system, they must, at all times, be trustworthy. This requires them to, at all times and at all cost (political or personal), avoid any impropriety. As so prudently stated by the National Center for State Courts, **"It is the appearance of impropriety, even without any connection to the actual impropriety that can be so damaging to the public's trust in our judicial system".**

Thank you for your consideration of this motion.

/s/ Robert H. Lenham
Robert H. Lenham, pro se
Plaintiff/Appellant

IN THE COURT OF APPEAL
OF THE STATE OF NEW MEXICO

Robert H. Lenham

(Plaintiff-Appellant)

Vs.

Disabled American Veterans

(Defendant-Appellee)

Court of Appeals
No. 27,087
Santa Fe County
D0101-CV-96-01606

MOTION FOR RECONSIDERATION OF MOTION TO DISQUALIFY JUDGE MICHAEL E. VIGIL AND TO VACATE HIS PROPOSED SUMMARY DISPOSITION AND MOTION FOR REHEARING

(Filed Oct. 8, 2008)

I, Robert H. Lenham, respectfully request this Court grant this Motion For Reconsideration of Motion To Disqualify Judge Michael Vigil and to Vacate His Proposed Summary Disposition and Motion For Rehearing.

Upon receipt of Judge Michael E. Vigil's Proposed Summary Disposition (PSD), I filed a motion respectfully requesting that this Court disqualify him from presiding over this case and vacating his PSD due to his connection with several of the attorneys of this case.

This court denied the Motion stating that my concerns of impropriety and/or the appearance of impropriety

were 'moot' because the case would be decided by three Judges, not one. I have attached the Motion for your convenience and review (please note that on page 1, paragraph 1 of the Motion, the phrase 'impartiality and/or appearance of impartiality' was a typo and should read 'impropriety and/or appearance of impropriety') and respectfully ask that you reconsider in light of the fact that Judge Vigil and the other 2 Judges affirmed Judge Vigil's PSD..

With all due respect, I resubmit that Judge Vigil, when presiding over a case involving his strongest Judicial advocates, those who solicited thousands and thousand of dollars for him, can not reasonably be perceived as impartial. At the Oral Hearing, the arguments of the opposition consistently referred to Judge Vigil's PSD as a basis for affirmance.

[After consultation with the original panel, the motion is denied. Lynn Pickard Presiding Judge 10-10-08 /s/ LP]

The fact that the other 2 Judges were 'bombarded' with reference and justification of the PSD, (i.e., argument by the opposition in support of Judge Vigil's PSD as well as Judge Vigil's reassertion of his PSD during the Oral Hearing, and ultimately 'recessing for 15 minutes with Judge Vigil' to decide), at the very least, presents the appearance of bias.

The Judges required just 15 minutes to decide that Judge Vigils Proposed Summary Disposition would stand.

I respectfully request a Rehearing before a different panel of Judges who have not been influenced by Judge Vigil's PSD or Judge Vigil, himself.

Also, this Court's argument that the issue of "Enforcement of Settlement" is barred by the doctrine of law of the case conflicts with case law. In **Bessemer Board of Ed. v.. Tucker. Ms. 207D390 (Ala. Civ. App. June 20, 2008)** application of the 'law of the case' doctrine was found not to be 'inflexible'. "The doctrine directs a court's discretion; it does not limit a court's power", **Slip Opinion p. 7.** Also, "On remand, courts are often confronted with issues that were never considered by the remanding court. 'In such cases, 'broadly speaking, mandates require respect for what the higher court decided, not for what it did not decide'. **United States v. Kellington, 217 F.3d 1084, 1093 (9th Cir.2000)**. (quoting **Biggins v. Hazen Paper Co., 111 F.3d 205, 209 (1st Cir. 1997)**.

Significant to note is the fact that the issues deemed appropriate before this Court (sanctions for not agreeing to enforcement of settlement, attorneys fees for enforcement of settlement' for which I did not agree, etc.) exist solely because I did not agree to the enforcement of settlement otherwise, this entire appeal (6 years) would have been moot.

The remaining issues deemed by this Court to be without merit must be heard by an impartial panel. I respectfully request that this court grant these motions and schedule a rehearing at its earliest convenience.

Thank you for your consideration of these Motions.

Respectfully,

/s/ Robert Lenham
Robert Lenham, Pro Se

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM,

Plaintiff-Appellant,

vs.

DISABLED AMERICAN VETERANS,

Defendant-Appellee,

vs.

J. EDWARD HOLLINGTON & JOHN L. LOESCHEN,

Interested Parties,

and

TIMOTHY L. BUTLER & GARY L. RICHARDSON, RICHARDSON LAW FIRM, PC,

Interested Parties.

No. 27,087
Santa Fe County
D0101-CV-96-01601

ORDER

(Filed Oct. 29, 2007)

This matter having come before the Court on Appellant Robert Lenham's Motion to Disqualify Judge Michael E. Vigil From Presiding Over This Case and Motion to Vacate Judge Michael Vigil's Proposed Summary Disposition of This Case, and it appearing that:

1. This case was assigned to the Expedited Bench Decision program by this Court's order filed October 16, 2007; and

2. This case will be decided by a panel of three judges in accordance with the Expedited Bench Decision program;

NOW, THEREFORE, IT IS ORDERED that this motion is **DENIED** as **MOOT**.

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE,
Judge

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

No. SF 96-1601 (CV)

ROBERT H. LENHAM,

Plaintiff,

vs.

DISABLED AMERICAN VETERANS, et al.

Defendants.

ORDER ON ATTORNEYS FEES AND DISMISSAL OF CASE WITH PREJUDICE

(Filed Aug. 16, 2006)

~~Plaintiff Robert H. Lenham,~~ Defendant Disabled American Veterans and Interested Parties Timothy L. Butler, Esq., and Richardson & Ward, ("Butler & Richardson"), J. Edward Hollington and John Loeschen ("Hollington & Loeschen"), ~~all~~ [who are /s/ DS] former attorneys of Plaintiff Robert H. Lenham, hereby stipulate and agree as follows and, based upon such stipulation and agreement of the Parties, the pleadings, and the facts and circumstances attendant to this matter,

THE COURT HEREBY FINDS:

1. Pursuant to the New Mexico court of Appeals Memorandum Opinion filed on April 5, 2004, the parties submitted their proposed findings of fact and conclusions of law. These

proposed findings and conclusions of the various parties were reviewed by Judge Carol J. Vigil together with the extensive pleadings at her disposal.

2. Judge Vigil, "having reviewed the parties' submitted findings and conclusions, having considered the prior arguments of counsel, having considered the pleadings on file, and otherwise being apprised of the issues" adopted the court's June 8, 2005 Findings of Fact and Conclusions of Law, and entered its Order giving effect to the same on September 21, 2005.

3. Of the settlement amount of $300,000, Plaintiff Lenham was previously awarded and was paid $130,452.60.

4. From the remaining "169,547.40, Judge Vigil's September 21, 2005 Order awarded Defendant disabled American Veterans the sum of $26,700.52 in attorneys fees and costs, and awarded Butler & Richardson the sum of $108, 152 [sic] in attorneys fees and costs and reserved the remaining funds ($34,694.88) to be applied against fees to be awarded Hollington & Loeschen upon application for such fees, with Plaintiff Lenham liable for any additional fees awarded Hollington & Loeschen in excess of these remaining funds.

5. Pursuant to Judge Vigil's Order, Hollington and Loeschen have filed their application for attorneys fees based in quantum meruit, seeking $88,975.74. No party or interested

party has opposed this application for attorneys fees.

6. In lieu of adjudication on the Hollington & Loeschen application for attorneys fees, Defendant DAV and Interested Parties Butler & Richardson and Hollington & Loeschen have agreed to distribute the $169,547.40 in attorneys fees and costs as follows: DAV $26,700.52, Butler & Richardson $92,850.47 and Hollington & Loeschen $49,996.41

7. ~~The Parties agree that this case shall be dismissed with prejudice.~~ [Plaintiff continues to object to and oppose this agreement /s/ DS]

WHEREFORE, IT IS HEREBY ORDERED THAT:

Defendant DAV shall distribute the $169,547.40 remaining in its Trust Account pertinent to this action, as an award of attorneys fees and costs in this matter as follows: DAV $26,700.52, Butler & Richardson $92,850.47 and Hollington & Loeschen $49,996.41.

It is FURTHER ORDERED that this case shall be and is hereby dismissed with prejudice.

/s/ Daniel Sanchez
District Court Judge

~~**STIPULATED AND AGREED TO:**~~

_____

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

ROBERT H. LENHAM

Plaintiff,

vs.

No. SF 96-1601(C)

DISABLED AMERICAN VETERANS,

Defendant.

ORDER AND JUDGMENT FOR DEFENDANT DAV ON THE COURT'S AWARD OF SANCTIONS AGAINST PLAINTIFF ROBERT H. LENHAM

(ENDORSED Sep. 21, 2005)

THIS MATTER came before the Court on remand from a Memorandum Opinion filed on April 5, 2004 by the New Mexico Court of Appeals. The Court, having reviewed the parties' submitted findings and conclusions, having considered the prior arguments of counsel, having considered the pleadings on file, and otherwise being fully apprised of the issues, hereby **FINDS, ORDERS, ADJUDGES AND DECREES** that:

1. The Court's Findings of Fact and Conclusions of Law, filed on June 8, 2005, are hereby adopted by the Court; and

2. Pursuant to the Court's June 8, 2005 Findings of Fact and Conclusions of Law, the Court hereby

awards the DAV costs and fees in the amount of $26,700.52, and Butler/Richardson $108,152 (lien amount of $142,000 less $33,848 fees paid by Lenham to Butler/Richardson) to be paid from the remaining settlement funds in this case. Any settlement funds remaining shall be paid into the Court's registry pending cost and fee application by Messrs. Loeschen and Hollington and shall be applied against any such award by this Court, with any further remainder to be paid to Mr. Lenham.

/s/ ORIGINAL SIGNED BY
JUDGE CAROL J. VIGIL
THE HONORABLE
CAROL J. VIGIL
District Court Judge

Submitted:

MADISON, HARBOUR, MROZ
& BRENNAN, P.A.

/s/ Rebecca Kenny for
William C. Madison, Esq.
Michael J. Dekleva, Esq.
P.O. Box 25467
Albuquerque, NM 87125-5467
(505) 242-2177

Attorneys for Disabled
American Veterans

APPROVED AS TO FORM:

Joseph P. Kennedy, Esq.
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Albuquerque, NM 87102
Attorney for Plaintiff

Via Telephonic Approval of 6/17/05
Timothy L. Butler, Esq.
125 Lincoln Avenue, Suite 400
Santa Fe, NM 87501
Interested Party

Supreme Court, U.S.
FILED
JUN 15 2009
OFFICE OF THE CLERK

No. 09-212

In The

Supreme Court of the United States

ROBERT H. LENHAM,

Petitioner,

v.

DISABLED AMERICAN VETERANS,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

SUPPLEMENTAL APPENDIX

ROBERT H. LENHAM, Pro Se
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Whitehouse, Texas 75791
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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
January 15, 2009

NO. 31,390

ROBERT H. LENHAM,

Plaintiff-Petitioner,

v.

DISABLED AMERICAN VETERANS,

Defendant-Respondent,

and

J. EDWARD HOLLINGTON & JOHN L. LOESCHEIN [sic], **TIMOTHY L. BUTLER & GARY L. RICHARDSON, and RICHARDSON LAW FIRM, P.C.,**

Real Parties in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon Motion for Reconsideration and the Court having considered said motion, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for reconsideration is DENIED.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 15th day of January, 2009.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

THE SUPREME COURT OF THE STATE OF NEW MEXICO
November 26, 2008

NO. 31,390

ROBERT H. LENHAM,

Plaintiff-Petitioner,

v.

DISABLED AMERICAN VETERANS,

Defendant-Respondent.

and

J. EDWARD HOLLINGTON & JOHN L. LOESCHEIN [sic], TIMOTHY L. BUTLER & GARY L. RICHARDSON, and RICHARDSON LAW FIRM, P.C.,

Real Parties in Interest.

ORDER

(Filed Dec. 2, 2008)

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 27087.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 26th day of November, 2008.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM,

Plaintiff-Appellant,

vs.

DISABLED AMERICAN VETERANS,

Defendant-Appellee.

No. 27,087
Santa Fe County
D-0101-CV-96-01601

NOTICE

PROPOSED SUMMARY DISPOSITION

(Filed Mar. 6, 2007)

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **January 19, 2007**

This case has been assigned to the ***SUMMARY CALENDAR*** pursuant to Rule 12-210(D) NMRA.

Summary affirmance is proposed.

Note: This is a ***proposal*** of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition should or should not be made.

See Rule 12-210(D) NMRA.

Plaintiff appeals from the district court's final order in his wrongful termination suit against Disabled American Veterans (DAV). Under this order, the district court divided a $300,000 settlement as follows: $92,850.47 to Plaintiff's first attorneys, Timothy Butler and Gary Richardson (Butler/Richardson); $49,996.41 to Plaintiff's second attorneys, J. Edward Hollington and John Loeschen (Hollington/Loeschen); $26,700.52 to DAV as a sanction; and $130,452.60 to Plaintiff. Plaintiff, who had previously paid Butler/Richardson $33,848 in attorney fees and who presumably owed additional fees to subsequent attorneys not addressed by the order, alleges that his net recovery was $62,756.60. The final order was agreed to by DAV, Butler/Richardson, and Hollington/Loeschen, but not agreed to by Plaintiff. [RP 3639-41]

Plaintiff raises six issues related to the allocation of the settlement proceeds. We consider Plaintiff's issues 1, 4, and 5 individually, and consolidate issues 2, 3, and 6.

Issue 1: Plaintiff contends that the record does not contain particularized findings of bad faith sufficient to support the district court's award of a $26,700.52 sanction to DAV. "We entrust sanctions short of dismissal to the sound discretion of the trial court." *Lujan v. City of Albuquerque*, 2003-NMCA-104, ¶ 8, 134 N.M. 207, 75 P.3d 423. "The choice of sanctions for discovery violations lies within the discretion of the trial court, and it will be reversed only for an abuse of discretion." *Alexander v.*

Anderson, 1999-NMCA-021, ¶ 34, 126 N.M. 632, 973 P.2d 884.

> The right to recover attorneys fees from an opposing party as part of the costs did not exist at common law. Allowance of attorneys fees as an item of costs is not allowable in the absence of a statute, rule of court, or some agreement expressly authorizing the taxing of attorneys fees in addition to ordinary costs.

Gurule v. Ault, 103 N.M. 17, 19, 702 P.2d 7, 9 (Ct. App. 1985) (citations omitted). This Court has also recognized a bad-faith exception:

> [A] New Mexico court may award attorney fees . . . when a party shows bad faith by disrupting litigation or hampering enforcement of court orders, or when it is necessary to vindicate judicial authority and make the prevailing party whole for expenses caused by an opponent's obstinacy under circumstances in which the opponent's behavior is characterized by bad faith or vexatious oppression.

State ex rel. New Mexico State Hwy. and Transp. Dept. v. Baca, 116 N.M. 751, 754, 867 P.2d 421, 424 (Ct. App. 1993), *rev'd in part*, 120 N.M. 1, 896 P.2d 1148 (1995) (internal punctuation and citations omitted).

On remand and pursuant to instructions from this Court's memorandum opinion filed April 5, 2004 in Nos. 24,310 and 24,506, the district court in the

present case entered findings of fact and conclusions of law. [RP 3492-3523] The district court's concerns in awarding the $26,700.52 in fees and costs were twofold. First, the district court found that Plaintiff had agreed to settle the case and then backed out of the agreement, necessitating additional litigation to enforce the settlement. Second, the district court found that Plaintiff, in responding to a request for production of documents, had withheld two letters dated February 7 and February 9, 2001 that tended to show he had agreed that the case had been settled at that point in the litigation. In awarding the $26,700.52 to DAV, the district court found that that was the amount of additional attorney fees and costs DAV had incurred in enforcing the settlement and moving for discovery sanctions. *See* findings of fact nos. 58-59. [RP 3513] The court refers to the affidavit of DAV's attorney and their bill of costs as the basis for the specific amount of the sanction. [RP 3100-06, 3115] The court specifically found that under the circumstances, "Lenham's failure to produce the February 7th and February 9th documents suggests bad faith." Finding of fact no. 72. Finally, the court found that the $26,700.52 in attorney fees and costs awarded for the expenses of enforcing the settlement was "sufficient to address the court's concern over the non-production of these documents," and did not award an additional sanction for the discovery violation. Finding of fact no. 73. [RP 3516-17]

We propose to hold that the district court did not err in awarding a sanction of $26,700.52 against Plaintiff in favor of DAV.

Issues 2, 3, and 6: Three of Plaintiff's issues relate to the fairness and amount of attorney fees and charging liens. In our memorandum opinion filed April 5, 2004, we remanded this case to the district court with instructions to "take further evidence and to permit the parties to tender requested findings of fact and conclusions of law." Memorandum opinion, p. 18. [RP 3393] As far as can be determined from the record, the only further evidence taken consists of an affidavit and billing records submitted by Loeschen and an affidavit submitted by counsel for DAV. [RP 3399-3415, 3438-39] We did not order that testimonial evidence be taken in any particular form. Our goal was to obtain findings of fact and conclusions of law sufficient to permit review. We propose to rule that the findings and conclusions submitted by the district court adequately satisfy our intent in remanding the case. [RP 3492-3522] In findings of fact numbers 1-24, the district court set forth the history of Butler/Richardson's efforts in the case and its negotiation of a proposed settlement for $300,000, the same amount Plaintiff ultimately agreed to with different attorneys. See, in particular, finding number 20-A, detailing such efforts over three-and-a-half years as having filed over 200 pleadings and responded to 10 motions for summary judgment. [RP 3492-3500] In conclusions of law numbers 14-21, the district court pointed out that

Plaintiff admitted to the existence of the fee agreement. The court also cited *Robison v. Katz*, 104 N.M. 133, 717 P.2d 586 (1986), for the proposition that an attorney may assert a charging lien even though he or she is not the party's current attorney at the time a fund is obtained from the attorney's efforts. [RP 3519-21]

"Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien." *Northern Pueblos Enterprises v. Montgomery*, 98 N.M. 47, 49, 644 P.2d 1036, 1038 (1982). We propose to hold that the fee amount ultimately awarded to Butler/Richardson was reasonable. First, Plaintiff signed a contingency fee agreement for 45% of the proceeds. Butler/Richardson's fee, had they been Plaintiff's sole attorneys and obtained the $300,000, should have come as no surprise to Plaintiff. The district court's rationale in initially allowing Butler/Richardson's lien in full in the order of September 21, 2005 was apparently that they had done essentially all of the work. This was not entirely correct, as Plaintiff had not yet agreed to the $300,000 settlement at the time they withdrew, nor had work been done on finalizing the details of the settlement and otherwise bringing the case to an end. Our concerns in this regard are adequately resolved, however, by Butler/Richardson's eventual agreement in the August 16, 2006 final order to settle for a total of $126,698.47 (i.e., $92,850.47 in the final order plus $33,848 previously

paid), substantially less than the lien amount of $142,000. Accordingly, the attorney fee paid to Butler/Richardson was reasonable in the circumstances.

Under the August 16, 2006 final order agreed to by DAV, Butler/Richardson, and Hollington/Loeschen (but not by Plaintiff), the district court recognized that Plaintiff had previously been awarded and paid $130,452.60 of the $300,000 settlement. The remaining $169,547.40 was to be divided as follows: $26,700.52 to DAV, $92,850.47 to Butler/Richardson, and $49,996.41 to Hollington/Loeschen. [RP 3639-41] Plaintiff's docketing statement does not reveal the source of the $62,756.60 figure cited as Plaintiff's net recovery. [DS 5] Presumably it arises from subtracting the $33,848 attorney fees Plaintiff previously paid to Butler/Richardson, and fees and costs paid subsequent to Hollington/Loeschen's withdrawal, from the $130,452.60 paid to Plaintiff.

Plaintiff's rather small net recovery of (according to the docketing statement) $62,756.60 appears to be in large part of his own making. The district court found that he had acted in bad faith in failing to produce documents that tended to show that he had reneged on the settlement. The district court found that Butler/Richardson's withdrawal was reasonable. See conclusion of law number 19. [RP 3521] According to Loeschen's affidavit filed on July 16, 2004, in Loeschen's initial discussions with Plaintiff he advised that "the best thing for him to do was to patch up his relationship with his previous attorneys," i.e., Butler/Richardson. [RP 3400] At the

time he entered his fee agreement with Loeschen, Plaintiff was on notice that there were outstanding fees due to Butler/Richardson. Plaintiff does not cite any authority, nor do we find any, for the proposition that reasonableness of attorney fees necessarily bears any relationship to the amount recovered. This Court does not decide issues for which no authority is cited. *In the Matter of Doe*, 100 N.M. 764, 676 P.2d 1329 (1984); Rule 12-208(D)(5) NMRA. *See also Robison*, 104 N.M. at 135, 925 P.2d at 588 (stating "We observe the sad fact that the attorneys' fees claimed here far exceed, and thus consume the total amount to which the client is entitled.").

***Issue 4*:** Plaintiff argues that the district court should have allowed a contingency fee to Hollington/Loeschen to be calculated based on Plaintiff's net recovery after paying his first attorneys. Plaintiff cites no convincing authority for this proposition. In *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, 122 N.M. 103, 920 P.2d 1057, cited by Plaintiff, the district court remanded the case for a determination of whether the attorneys had misappropriated client funds, and if so, to reduce their fee award by the amount misappropriated. *Lozano* says nothing about the proper number to be used as a starting point for calculating a subsequent attorney's contingency fee.

We also observe that the district court set aside Hollington/Loeschen's 45% contingency fee agreement, which would have resulted in an attorney fee of $135,000 had it been calculated from the $300,000 settlement. After applying for $88,975.74 in fees

based on quantum meruit, Hollington/Loeschen ultimately agreed to settle for $49,996.41, less than half of the amount they would have received had the contingency fee contract not been set the circumstances would suggest that Loeschen knew the case could be settled with comparatively little work on his part, and a 45% contingency fee agreement would likely be questionable. The inconsistency arose from DAV counsel's assertion that the likelihood of settlement for $300,000 had been discussed with Loeschen on June 30, 2000 in the course of preliminary inquiries Loeschen made of DAV about the status of the case before entering the fee agreement. In contrast, at a February 18, 2002 hearing, Loeschen denied that he ever knew any specific amount had been discussed until new settlement negotiations were undertaken in late 2000.

The district court's findings of fact and conclusions of law after remand, while not really explaining how the inconsistent representations came to be made before that court, adequately address our concerns about fiduciary duty. The district court, referring to the affidavits of both Loeschen and counsel for DAV, found that the $300,000 figure had been mentioned prior to the fee agreement, but the context was DAV counsel's assertion that the offer was off the table because of Plaintiff's refusal to go through with the settlement, and that counsel for DAV was not optimistic that the offer would again be available. See generally, finding of fact 28 and subparagraphs. [RP 3501-05]

Accordingly, we propose to affirm the order of the district court.

/s/ Michael E. Vigil
MICHAEL E. VIGIL, Judge

(3)

Supreme Court, U.S.
FILED
SEP 18 2009
OFFICE OF THE CLERK

No. 09-212

In the
Supreme Court of the United States

ROBERT H. LENHAM,

Petitioner,

v.

DISABLED AMERICAN VETERANS

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals Of the State Of New Mexico

DISABLED AMERICAN VETERANS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner Robert Lenham's Petition for Writ of Certiorari should be denied because it fails to present an issue, based on the trial record, warranting consideration by this Court.

PARTIES TO THE PROCEEDING

Petitioner Robert Lenham, Respondent Disabled American Veterans, and Interested Parties J. Edward Hollington, John L. Loeschen, Timothy L. Butler, Gary Richardson, and Richardson Law Firm, P.C. are parties to the proceeding in the court whose judgment is under review.

BASIS OF JURISDICTION

The questions raised in the Petition for Writ of Certiorari fail to raise or invoke any jurisdictional requirements required by this Court for its review.

STATEMENT OF THE CASE

This case arises from a wrongful termination lawsuit filed by Petitioner, Robert Lenham (hereafter "Petitioner"), against Respondent, Disabled American Veterans ("DAV") over thirteen years ago. While the case has been pending since 1996, over half of its duration have been devoted to issues of enforcement of a settlement agreement, the enforceability of sanctions awarded against Petitioner by the New Mexico state district court, and the enforceability of attorneys fees' liens filed by some of Petitioners' former attorneys (hereafter collectively referred to as the "enforcement phase").

This case now comes before the Court on issues arising solely from the enforcement phase of the litigation. On December 7, 2001, the New Mexico State

District Court for the First Judicial District (the "district court"), ordered enforcement of a $300,000 settlement agreement, and awarded costs and fees to DAV in the amount of $26,700.52. [*See* Petitioner's Brief, App. 4], On July 2, 2002, the district court entered a final order allowing Petitioner's first two attorneys, Gary Richardson and Timothy Butler ("Richardson and Butler") to keep a $33,884 payment made by Petitioner, denying Richardson and Butler's charging lien, and enforcing the charging lien of Petitioner's second two attorneys, John Loeschen and Edward Hollington ("Loeschen and Hollington") in the amount of $142,846.88. [*Id.*] The remaining amount was awarded to Petitioner and his new attorney, Joseph Kennedy ("Kennedy"). [*Id.*] In two consolidated appeals, Petitioner appealed the $26,700.52 award to the DAV, and Butler and Richardson appealed the district court's ruling on their charging lien. [*Id.*]

The New Mexico Court of Appeals (the "Court of Appeals") issued a memorandum opinion on April 5, 2004. [*Id.*]. The Court of Appeals vacated the district court's order, held that the order was not sufficiently supported by findings of fact and conclusions of law, and remanded the case for the district court to take further evidence, make findings and conclusions, and enter a new order. [*Id.*]. On remand, the district court took further evidence in the form of affidavit testimony from two of the attorneys, and further litigation ensued, related primarily to how the attorneys' fees would be distributed. [*See* Petitioner's Brief, App. 5]. Following the additional litigation, the district court entered a final order on August 16, 2006, recognizing that Petitioner had already been paid $130,452.60 of the $300,000 settlement, and dividing the remaining $169,547.40 between DAV

($26,700.52), Richardson and Butler ($92,850.47), and Loeschen and Hollington ($49,996.41). (*Id.*). Petitioner appealed this order.

After hearing oral arguments, the Court of Appeals filed its decision on Petitioner's Appeal on September 23, 2008, affirming the August 16, 2006 final order of the district court. [*See* Petitioner's Brief, App. 2]. The decision of the Court of Appeals was authored by Judge Lynn Pickard, with Judges Jonathan B. Sutin and Michael E. Vigil concurring. [*Id.* at App. 2 & App. 18]. With regard to the two appellate issues that pertain to DAV, the Court of Appeals first affirmed the district court's enforcement of the settlement agreement on two bases: (a) under the doctrine of law of the case, after noting that Petitioner had not raised the enforcement of settlement issue during the prior appeal; and (b) as supported by substantial evidence in the record. [*See* Petitioner's Brief, App. 8-9]. Second, the Court of Appeals affirmed the award of $26,700.52 to DAV as supported by substantial evidence in the record, under New Mexico's bad faith exception to the general rule that each party pay its own attorneys fees and costs:

> As instructed to do in our prior opinion, the court found, and supported its findings by specific record references, that Lenham had agreed to settle the case and then backed out of the agreement, necessitating additional litigation to enforce the settlement. . . . The record is rife with sworn affidavit testimony that Lenham reneged on the final settlement agreement, ultimately requiring DAV to successfully move the [district] court to enforce the agreement. Accordingly, we cannot say

> that the court abused its discretion by awarding attorney fees and costs under the bad faith exception. The evidence supports the district court's conclusion of law that "awarding the DAV its costs and fees in the amount of $26,700.52 was reasonable and justified in order for the court to vindicate its judicial authority and compensate [DAV] for the expenses incurred as a result of frivolous and vexatious litigation," and we affirm the district court on this issue.
>
> [*See* Petitioner's Brief, App.10-11]

For the reasons outlined below, the Court of Appeals' decision affirming the district court's order, including "the entire award of sanctions," [*See* Petitioner's Brief, App. 12] does not present an issue appropriate for review by the United States Supreme Court.

SUMMARY OF ARGUMENT AND REASONS FOR DENYING THE WRIT

A. The Petition for Writ of Certiorari Does Not Present An Issue Appropriate for Review By The United States Supreme Court.

Petitioner has not presented an issue that is appropriate for review by the United States Supreme Court. Rule 10 of the Rules of the Supreme Court of the United States sets forth that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and that "[a] petition for a writ of certiorari will be granted only for compelling reasons." For the reasons set forth below, no such "compelling reasons"

exist, and the Petition for Writ of Certiorari should be denied.

B. The New Mexico Court of Appeals' Substantial Evidence Review Of Rulings Made By The New Mexico State District Court, Does Not Present Issues For United States Supreme Court Review.

With regard to the issues pertaining to DAV, Petitioner is asking the United States Supreme Court to hear a case that is nothing more than the New Mexico Court of Appeals' substantial evidence review of a state trial court's findings of fact and conclusions of law on the issue of enforcement of a settlement agreement. The United States Supreme Court will consider granting certiorari in cases where (1) "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," [Sup. Ct. R. 10(a)], (2) "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United Stated court of appeals" [Sup. Ct. R. (b)], or (3) "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the United States Supreme Court], or has decided an important federal question in a way that conflicts with relevant decision of this Court" [Sup. Ct. R. 10(c)]. Of significance here is the fact that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." [Sup. Ct. R. 10].

In this case, the New Mexico Court of Appeals conducted a substantial evidence review of the enforcement of settlement issue and the award to DAV of attorneys' fees and costs. The Court of Appeals noted that an appellate court is "deferential to the facts found by the trial court," *Strata Prod. Co. v. Mercury Exploration Co.*,121 N.M. 622, 627, 916 P.2d 822, 827 (1996), [*See* Petitioner's Brief, App. 6], and if the trial court applied the law correctly, a decision will be upheld if the findings of facts are supported by substantial evidence, *Berry v. Fed. Kemper Life Assurance Co.*, 136 N.M. 454, 464, 99 P.3d 1166, 1176 (Ct. App. 2004) [*See* Petitioner's Brief , App. 6]. The Court of Appeals noted that it does "not reweigh evidence on appeal," *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 123 N.M. 329, 940 P.2d 177 (Ct. App. 1997) [*See* Petitioner's Brief, App. 7], or decide the facts of the case. *State v. Gonzales*, 126 N.M. 742, 744, 975 P.2d 355, 357 (Ct. App. 1999) [*See* Petitioner's Brief, App. 7].

Having noted these foundational principles of New Mexico law controlling appellate review, the Court of Appeals affirmed the rulings of the trial court on those issues that pertain to the DAV (enforcement of the settlement agreement, and the award of attorneys fees and costs) on the grounds that those rulings were supported by substantial evidence [*See* Petitioner's Brief, App. 8-12]. With regard to these issues, Lenham is petitioning this Court for writ of certiorari to review a substantial evidence review on these issue conducted by the New Mexico Court of Appeals. Even if erroneous, which DAV denies, a case of alleged erroneous factual findings by a state court is in the category of cases that the United States Supreme Court rarely accepts on a

Petition for Writ of Certiorari. [Sup. Ct. R. 10]. For this reason, Petitioner's Petition for Writ of Certiorari should be denied.

C. The Petitioner's Claim That The Honorable Carol Vigil Exhibited Judicial Bias Should be Rejected.

Petitioner's claim of judicial bias by The Honorable Carol Vigil should be rejected. The Court of Appeals rejected pro-se Petitioner's argument that Judge Carol Vigil exhibited bias when using phrases like "we attorneys" and "we as attorneys," by concluding that "[w]e fail to see how these statements by the judge demonstrate any bias or impartiality on her part." [*See* Petitioner's Brief, App. 17-18]. There is no reason for this Court to now revisit the issue.

D. There Is No Evidence To Support Petitioner's Claim That The Honorable Michael Vigil Exhibited Judicial Bias, And The Cases Cited By Petitioner Do Not Support A Claim of Judicial Bias Under The Facts Alleged In This Case.

The record in the instant matter is devoid of any evidence to support Petitioner's claim of judicial bias by the Honorable Michael Vigil (hereafter "Judge Vigil"). Petitioner's brief erroneously claims that Judge Vigil's refusal to recuse himself resulted in a conflict with this Court's due process precedent and that it adds to the split of authority that exists among the lower courts regarding the circumstances in which recusal is constitutionally required. [Petitioner's Brief, pp. 7, 11]. However, Petitioner makes the claim without citing to the record to demonstrate evidentiary support of his claim of judicial

bias, and fails to provide what, if anything, about his case warrants review by this Court. Instead, Petitioner's brief is essentially an essay of his thoughts on the case, along with some citations to inapplicable, factually extreme cases that he neither explains the applicability of, nor discusses in any meaningful way in his Petition to this Court. In short, Petitioner utterly fails to demonstrate that the unanimous written decision of a three-Judge panel of the New Mexico Court of Appeals, authored by the Honorable Lynn Pickard, was somehow the product of bias on the part of concurring panelist, Judge Vigil.

1. Petitioner does not identify any authority applicable to his argument that Judge Vigil's refusal to recuse himself conflicts with the Court's due process precedent.

Petitioner cites to *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009) for the premise that the facts of *Caperton* parallel the instant matter and that the "same profound ramifications for the Due Process Clause's guarantee of judicial impartiality" found in *Caperton* are also present in this case. [*See* Petitioner's Brief, p. 7]. In *Caperton*, the probability of actual bias rose to an unconstitutional level because the principal of a coal company contributed $3 million to replace an incumbent Supreme Court of Appeals Judge anticipated to be reviewing a $50 million judgment that had been entered against the coal company at the trial court level; the contribution eclipsed the total amount spent by all other supporters and exceeded by 300% the amount spent by the judge's campaign committee. *See generally, Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009). In *Caperton*, this Court stated:

> Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. *The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.*

Caperton, 129 S.Ct at 2263 (internal quotations and citations omitted) (emphasis added). Furthermore, "[t]he temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." *Id.* at. 2264. In the instant matter, neither the record nor Petitioner's brief provides any support or evidence of issues that would be analogous to those raised in *Caperton.* Petitioner's claim of judicial bias in the instant case, unsupported by the record, is not somehow bolstered by the extreme facts of *Caperton,* which in no way resemble this Petitioner's own allegations in this case. Petitioner's reliance on *Caperton* is inapplicable and misplaced.

Petitioner also cites to *In re Murchison et al.*, 349 U.S. 133, 136 (1955) for the limited quote that "a fair trial

in a fair tribunal is a basic requirement of due process" and to *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972) for the premise that a "neutral and detached judge" is an essential component of the due process requirement. [*See* Petitioner's Brief, pp. 7, 11]. Petitioner's use of these cases is limited to short quotations without any reference to the context of the respective cases, neither of which remotely resemble the instant matter.

In re Murchison involved a lack of due process caused when a "one-man grand jury" judge required witnesses to appear in secret to testify about suspected crimes and then later presided over contempt hearings with the same witnesses. *In re Murchison et al.*, 349 U.S. at 134. In *Ward*, due process was denied because the town's mayor also sat as a judge in cases of ordinance violations and traffic offenses, and a major part of the village's income was derived from the fines, forfeitures, and costs and fees imposed by the judge in his mayor's court. *Ward*, 409 U.S. at 57, 61. The Court described the situation as one in which "an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Ward*, 409 U.S. at 60 (internal quotations and citations omitted). Neither of these two cases bear resemblance to Petitioner's allegations here and his citation to them has no reasonable or logical purpose aside from using the brief phrases he takes from both.

Additionally, Petitioner cites to *Peters v. Kiff*, 407 U.S. 493, 502 (1972) for the premise that, even without actual bias, due process is denied by circumstances that

create the likelihood or appearance of bias because the possibility of judicial impropriety creates a constitutionally unacceptable risk of actual impropriety. [*See* Petitioner's Brief, p. 8]. In *Peters*, the Caucasian petitioner argued that African-Americans had systemically been excluded from the grand jury that indicted him on burglary charges. The Court held that, whatever the race, a criminal defendant has standing to challenge the system to select his grand or petit jury on the grounds that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. *See generally*, *Peters v. Kiff*, 407 U.S. 493. *Peters* is not a case of judicial bias, but one of arbitrary exclusion of juries based on race. Petitioner's reliance on it is off the mark and inapplicable to the instant matter.

Similarly, Petitioner's reliance on *Commonwealth Coating Corp. v. Continental Casualty Company*, 393 U.S. 145, 150 (1986) for the premise that Judge Vigil's refusal to recuse himself is in opposition to the Supreme Court's requirement that a judge "must avoid even the *appearance* of bias" is misplaced, and a misreading of the actual case cited. In *Commonwealth Coating Corp.*, a subcontractor filed suit against a surety to recover money owed to the contractor for a painting job. *Commonwealth Coating Corp. v. Cont'l Cas. Co.*, 393 U.S. at 146. Pursuant to an agreement, the sub appointed one arbitrator, the contractor appointed another, and the arbitrators supposedly selected a neutral third arbitrator. *Id.* It eventually came to light that the third arbitrator had actually served as an engineering consultant for the contractor on many projects and that the two had close financial dealings for a period of years, although disclosure of this information was not made until after an

award was made on behalf of the contractor. *Id.* The facts of *Commonwealth Coating Corp.* demonstrated a clear conflict of interest; in contrast, Petitioner is unable to analogize any similar conflict of interest here.[1]

Petitioner cites to *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001) in support of his argument that "[f]ederal due process requires recusal whenever a judge receives substantial campaign contributions from a party who also solicited donations from other campaign supporters." [*See* Petitioner's Brief, p. 8] Petitioner's reading of *Pierce* is in error and he does not identify or discuss the case's very narrow holding regarding campaign contributions. In *Pierce*, the attorney of a divorcing husband, along with the attorney's father, each contributed $5,000 to the campaign of a judge before whom the divorce proceedings were pending. *Pierce*, 39 P.3d at 793-4. The *Pierce* court held that a judge's impartiality might reasonably be questioned when, as in *Pierce*, a lawyer independently 1) makes a campaign contribution to that judge in the maximum amount allowed by statute, and 2) a member of that lawyer's immediate family makes a comparable maximum contribution, and 3) that lawyer further assists the judge's campaign by soliciting funds on behalf of the judge, and the contributions and solicitations occur during a pending case in which the lawyer is appearing before that judge. *Pierce*, 39 P.3d at 798. "The facts of Petitioner's case in no way mirror *Pierce*, and Petitioner does not even attempt to analogize the two. In fact, Petitioner's citation to *Pierce* is beneficial for DAV

[1] Petitioner also cites to the "National Center for State Court's directive and cites to a brief quotation from the directive, but does not provide a citation or context from where the quote was taken. [*See* Petitioner's Brief, p. 8].

because, as the *Pierce* court stated, "[s]ome courts have determined that lawyers' contributions to judicial campaigns are normal incidents to the campaigns, and the contributions do not indicate any closer relation between the contributors and the recipients than would ordinarily exist between members of the same local bar." 39 P.3d at 376. (*citing to MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 (Fla. 1990), *quoting, Frade v. Costa*, 342 Mass. 5, 171 N.E.2d 863, 865 (1961). Regardless, Petitioner is unable to cite to anywhere in the record where the attorneys for the DAV made any monetary contributions whatsoever to or on behalf of Judge Vigil's campaign. For this reason, and for the reasons discussed above, Petitioner's reliance on *Pierce* is in error.

Finally, Petitioner cites to an additional three cases in support of his argument that Judge Vigil's decision to not recuse himself conflicts with the Court's precedent on due process, although none of three are analogous or even remotely similar to the case at hand. Petitioner cites [*See* Petitioner's Brief, p. 9] to *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), where is was held that the Due Process Clause of the Fourteenth Amendment provided that a defendant in a criminal contempt proceeding should be given a public trial before a judge other than the one the defendant personally criticized, particularly because the two openly engaged in a bitter controversy marked by strong language from both. *See generally, Mayberry*, 400 U.S. 455.

The Court held that the trial judge should have disqualified himself because "because [n]o one so cruelly slandered is likely to maintain that calm detachment

necessary for fair adjudication." *Mayberry,* U.S. 455 at 505.

Mayberry's holding is not fitting with this case as there were no slanderous or person attacks made between Petitioner and Judge Vigil, thus making Mayberry factually and legally inapplicable.

Petitioner also cites to *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) for the quote that "experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him." [*See* Petitioner's Brief, p. 9]. In *Withrow,* a physician argued that his due process rights were violated because the same members of the state board that conducted an investigation into allegations of professional misconduct were to also presiding over his suspension hearing. *Withrow,* 421 U.S. at 39-41. The Court held that the initial charge and the ultimate adjudication had different bases and purposes, and the fact that the same agency had made them in tandem did not in and of itself result in a procedural due process violation. *Id.* at 58. Thus, the *Withrow* holding found no violation of due process. *Id.* Petitioner cites to *Withrow* for the limited purpose of including a quotation he finds beneficial to his argument without properly discussing the context from where the quote was taken. [*See* Petitioner's Brief, p. 9] While this type of oversight is found throughout Petitioner's brief, it is an improper and misleading approach to presenting his argument.

Petitioner also cites, albeit briefly, to *Republican Party v. While,* 535 U.S. 765, 790 (2002) and Justice

O'Connor's concurrence wherein she states, "relying on campaign donations may leave judges feeling indebted to certain parties or interest groups." The issue in *Republican Party* was Minnesota's Judicial Code's "announce clause" and whether it violated the First Amendment. *Republican Party v. While*, 535 U.S. at 768. The Court held that the announce clause prohibited judicial election candidates from announcing their views on disputed legal and political issues. *Id.* at 788. Petitioner's citation to Justice O'Connor's quote fails to place the quote in context, namely that her concurrence is speaking to her "concerns about judicial elections generally." *Republican Party*, 535 U.S. at 789. Plaintiff relies on the portion quoted in his brief to support his contention that it is "a part of human nature for a judge to be biased *in favor* of a party whose Campaign Committee members facilitated his election to the bench" [Petitioner's Brief, p. 10], yet he provides no evidence, nor could he, to support his tacit argument that the attorneys for the DAV somehow "facilitated" Judge Vigil's election to the bench.[2]

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[2] In his first and only footnote, Petitioner cites to *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) for the quote that "[t]his Court has held that it "violates the Fourteenth Amendment . . . to subject [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in this case." [Petitioner's Brief, p. 11]. In *Tumey*, the mayor of a village had authority to sit as a judge with no jury. The mayor-judge received a salary supplement for performing judicial duties and funds for that compensation were derived from fines assessed in a case; no fines were assessed with an acquittal. Thus, the mayor-judge only received a salary supplement if he convicted the defendant. The Court held that the Due Process required disqualification because a judge cannot try a case when has a financial state in the outcome, notwithstanding the possibility that he might resist the temptation to be influenced by that interest. Petitioner likens this interest to Judge Vigil having an incentive to rule in favor of DAV because, supposedly otherwise, the attorneys for DAV would have little

2. Petitioner's citation to authority in support of his argument that Judge Vigil's refusal to recuse himself adds to the split of authority among lower courts fails to 1) define what, if any split, exists and 2) how the cited authority is applicable to the instant matter.

Petitioner states that "lower courts have reached conflicting conclusions regarding the federal constitutional standard governing recusal determinations – a conflict that extends to the campaign contribution setting implicated in this case," yet he fails to identify what the conflicting conclusions have been reached, or the jurisdictions that have contributed to the alleged split of authority. [*See* Petitioner's Brief, p. 11]. Moreover, the cases he cites to on this topic do not identify the split to which he refers to in the heading under section II of his brief. *Id.* Instead, Petitioner cites to a selection of unrelated case law and merely provides brief quotations taken out of context and without explanation as to how the merits of the respective cases support his position.

For instance, Petitioner cites to *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curium) for the quote that "[t]rial before an 'unbiased judge' is essential to due process." While this limited phrase may be an undisputed expectation of our courts, the context from which it was taken has no applicability to the instant matter. In *Johnson*, a judge was found to be so enmeshed in matters involving the defendant in a criminal matter,

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incentive to donate to any future election campaigns he may have. Petitioner's speculation on this matter is unfounded and without support.

including having been personally sued by the defendant, that the proper course of action was for the judge to have recused himself in a matter where he levied contempt charges against the defendant. See *generally*, *Johnson*, 403 U.S. 212. Here, the record is devoid of any relationship akin to the one found in *Johnson*; moreover, Petitioner does not provide how the *Johnson* ruling is related to a split in authority among any lower courts.

In support of his citation to *Johnson*, Petitioner also cites to *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) for the quote "due process requires not only that judges be fair, but that he also appears to be fair" and to *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) for the quote, "there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns." Both of these short quotes are not explained, nor is any contextual information provided as to the reasoning behind each of the respective statements. Petitioner's approach is misleading in this respect because it is necessary to put quoted words in some sort of context to appreciate their actual meaning.

In *Allen*, recusal of the judge was sought because the judge fondly referred to opposing counsel as a former law partner and by her first name, stated that "he could do anything he wanted because he was the judge," along with certain comments like, "unfortunately, sometimes you have to pay through the nose when you screw up." Allen, 139 S.W. 3d at 498-99. The Arkansas Supreme Court held that the judge's comment and rulings indicated his obvious bias. As the opinion reads, "[d]ue process requires not only that judges be fair, but that he

also appears to be fair . . . the colloquies in this case demonstrate the wisdom of the Clark rule, because when Judge Rutledge misread, at least the second motion to recuse, and repeatedly shut Allen off when Allen sought answers to his questions." *Allen*, 139 S.W.3d at 498. The judge's "remarks, along with the overall biased tone of (his) comments, indicate that he should have recused himself from the hearing." The tenor and exchange between the attorneys and judge in *Allen* are not present in our case, and Petitioner's citation to it is inapplicable. Likewise, in *Brandenburg*, the sole issue was whether a trial commissioner, who was married to an employee of the Commonwealth Attorney's office, was able to manifest the neutrality and detachment demanded of a judicial officer when presented with a warrant application for search and seizure. *See generally, Commonwealth v. Brandenburg*, 114 S.W.3d 830. The Kentucky Supreme Court held that mere association of the marital status of the commissioner to an employee of the prosecuting attorney's office created an appearance of impropriety in violation of state statute and that the trial commissioner situation might cause her to place more emphasis on the Commonwealth Attorney' opinion regarding the presence of probable cause in a warrant application because her husband was employed by that office. *Id.* at 833-6. Again, nothing in the instant case even resembles the facts found in *Brandenburg*, and the self-serving quotes Petitioner extracts from it are inapplicable and inapposite to this case.

Petitioner also cites to *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) and provides a lengthy quote from Justice Brennan's concurrence regarding impartiality being a fundamental requirement of due process.

Petitioner cites to this limited quote without explaining the case or how it applies to the current matter. *Aetna Life Ins. Co.* is one of extreme facts where an insurer refused to pay all of an insured's hospital bill and the insured filed suit in Alabama state court where he was eventually awarded a $3.5 million jury award for punitive damages. *See generally, Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813. The insurer applied for rehearing and learned that one of the five justices who had joined in the per curium majority decision had filed two actions in Alabama state court against insurers alleging bad-faith failure to pay insurance claims and seeking punitive damages. *Id.* The Court held that the justice who had independently filed separate actions against the insurer had a direct, personal, substantial, and pecuniary interest sufficient enough to establish a violation of the Due Process Clause of the Fourteenth Amendment which warranted his disqualification. *Id.* at 825. This case bears no resemblance to Petitioner's case, and his citation to it for the limited use of a quoted phrase is misleading.

Finally, Petitioner cites to two additional cases, neither of which support nor benefit his argument. The first, *State of Hawaii v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) is cited to for the limited purposes of a brief quoted phrase, namely, "due process requires that justice satisfy "satisfy the appearance of justice.' " In *Brown*, the question was whether a judge who caused a criminal contempt proceeding to be instituted could then sit with impunity in judgment of the accused. The Supreme Court of Hawaii reversed and remanded for entry of judgment of acquittal. *See generally, State of Hawaii v. Brown*, 776 P.2d 1182. Brown has no applicability to Petitioner's argument and his use of one of its quotes fails to take into

account the context of the opinion from which it was taken.

Petitioner also cites to *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1337n.4 (Fla. 1990) for the quote "there may very well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice." This quoted phrase is meaningless without explanation and Petitioner does not provide the perspective from which it was taken. In *MacKenzie*, the court concluded that a legal donation to a judge or her spouse's political campaigns, without more, is not a legally sufficient ground for disqualification. *See generally*, *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332. When Petitioner's quoted material is placed in some measure of context, it becomes clear that *MacKenzie* actually disfavors Petitioner's arguments. Petitioner does not address other pertinent issues raised in the case, such as:

> In Florida, as in Nevada, leading members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal from all cases from which that attorney might be involved.

MacKenzie, 565 So.2d at 1337. (internal quotations and citations omitted).

Also, "[c]ontributions such as the one at issue are normal incidents in a campaign for public office. As long

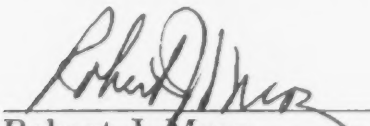
as it appears that a contribution was a normal incident in such a campaign, it does not tend to indicate any closer relationship between the contributor and the recipient than would ordinarily exist between members of the same local bar." *Id.* (internal quotations and citations omitted). Assuming for the sake of argument that Petitioner had even the slightest evidentiary support in the record for his argument that the attorneys for the DAV made even a nominal donation to Judge Vigil's campaign, the *MacKenzie* ruling would render his arguments meaningless.

CONCLUSION

As a whole, Petitioner fails to provide any authority that demonstrates that Judge Vigil's refusal to recuse himself conflicts with due process, or that it adds to a supposed split of authority among the lower courts as to when recusal is constitutionally required. Moreover, Petitioner fails to cite to anything in the record that would indicate due process was not met his case or why his case warrants review by this Court. For the reasons set forth above, Petitioner's Petition for Writ of Certiorari must be denied.

Respectfully Submitted,

MADISON, HARBOUR & MROZ, P.A



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